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The like pleas, in substance, upon the second count, to which the plaintiff demurs, and the defendants join in demurrer.

Mr. *Morton*, for the plaintiff.

The injury complained of by the defendant, can amount to no more than a surcharge of the common, by the owner of the soil (however the language of the pleader may have attempted to make it a nuisance), and the words used in the plea cannot alter the nature of the cause. *Collins v. Reynardson, Trin. 27 Geo. II.* where the defendant would have justified the pushing the plaintiff off a ladder by a *molliter manus imposuit*, to regain his property.

Now the legal, technical, signification of the word nuisance, includes not only an injury, but an act illegal in its own nature, as laying blocks in a common highway, &c. *Cro. Jac. 444*: whereas for coneyes to make burrows, is incident to their nature, and cannot be illegal; and that the owner of the soil has a right to stock the common with coneyes, and that the commoner has no right to chase, or kill, them, has been resolved by a series of authorities for 200 years together. *Bracton, lib. 4. 221*, and *Fleta*, establish the distinction between what is there called *nocumentum justum*, and the *nocumentum injuriosum*. In the latter case (as where the lord erects a wall, or hedge, to obstruct his commoner's entering to enjoy his common), the commoner may justify abating it; but where the act is just in itself (as here the lord's stocking the common with rabbits was), but, by an excess, becomes injurious to the commoner, there the law prescribes him a remedy by assize, or action on the case, but will not suffer him to be his own judge.

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*Yelc.* 104, *Cro. Jac.* 145, the commoner justified, for chasing off the coney, and held ill, and his remedy for a surcharge declared to be assize, or case. *Cro. Jac.* 229, the point was thought so clearly settled, that it was adjudged, without argument, that the commoner could neither destroy the coney, nor their burrows; yet, about four years after this, the commoners had again the spirit to bring on the question once more: 2 *Bulstr.* 116: in which case the ingenuity of the pleader endeavoured to represent it in a new light; that divers coney-burrows had been made, and erected, on the common, by means whereof the commoners' sheep often fell into them, and were likely to perish; and then shewed, in particular, that the defendant lost one of his sheep in that manner, and then justified the filling them up; and though this was argued to be only a remedying of a misfeasance, the plea was overruled, upon the general principle, that the commoner has nothing to do with the soil.

Since this, the present question has never come regularly before the court; and, therefore, on the authority of these uniform determinations, the plaintiff hopes he is entitled to judgment.

Mr. *Aston*, for the defendants.

I agree in the principles laid down for the plaintiff, but differ in the application of them; and shall lay out of the question the killing of any of the coney, as that is no part of the plea, nor can it be intended on this demurrer.

These general principles, 1st, that the lord may turn on his own beasts; 2dly, that the commoner may not chase them; 3dly, that the commoner has nothing to do with the soil, are applicable only *ad ea quæ frequentius*

## NOTES OF CASES IN K. B. &c.

*accidunt*; for it would be too much to say, that the lord cannot commit such an outrage as may justify the commoner's chasing his cattle off the common; as if he puts on distempered cattle, &c.

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Though this is said not to have been a nuisance, yet the case cited from *Cro. Jac.* 229, in terms, calls it so; and a surcharge is a private nuisance. 1 *Hawk. P. C.* 197. 2 *Ro. Abr. Tit. Indictmt. letr. Q.* and *Bracton, lib. 4.* 221, a thing may, by excess, grow to be a nuisance, by matter *ex post facto*.

The line perpetually drawn between the right of the lord, and commoner, is, the leaving sufficient common, without which the lord is a disseisor, and is destroying his own grant; therefore he cannot inclose, build, &c. without leaving sufficient, which is all one as leaving none at all, for no degree of sufficiency is mentioned in particular, and, in such case, the commoner may justify breaking down the inclosure of the whole. 2 *Mod.* 7. 2 *Inst.* 88. 15 *H.* 7. 10 b.

Lord *Hale*, in his *Analysis*, 110, says, that the remedy for a private nuisance is, 1st, without suit, viz. by abatement, which is the plainest, easiest, most expeditious, and most adequate, remedy; 2dly, by suit, as by *quod permittat*, &c. The first is put as the best, and most adequate, remedy, and, indeed, the rule in *Rt. Mary's* case, 9 *Co.* to avoid multiplicity of suits, holds strongly in favour of this method; for if one commoner may bring his action, every one may; to avoid which inconvenience, the law allows the party to justify doing that with his own hands, which the judgment of the law would otherwise have commanded to be done.

What has been so strongly urged, that the commoner

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cannot meddle with the soil, as if it were sacrilege even to touch it, cannot be understood in this extensive sense; for if so, how could he justify removing an inclosure, obstructing his enjoyment of his common, which all the books agree he may do? Thus a man may justify abating a nuisance, erecting in the soil of another to his detriment, as making a dam, by which my land is overflowed; and 9 *Ed.* 4. 35. *a.* by a grant of a conduit, or waterpipe, I have a right to enter, and dig the soil, to repair them, because that is incident to the grant.

It makes no difference, whether a commoner is deprived of a sufficiency of common, by the lord's inclosing, or by his surcharging, as in this case: in both there is a private nuisance, and the party may abate it of his own head.

This case is distinguishable from those which have been cited as in point; for here it is expressly alleged, that the common was surcharged, and the defendant deprived of the enjoyment of his common; whereas, in the cases mentioned, the commoners killed the rabbits, *to prevent* their surcharging the common.

Lord *Mansfield*, C. J.

The case is extremely plain, and clear.

Whether this was, or was not, a nuisance, is quite immaterial; the only question is, whether it was such a nuisance as the commoner might abate of his own head? So that the question turns only on the remedy; for though case, or assize, would lie, yet the present justification is bad, unless he had a right to abate the nuisance with his own hands.

To determine this question, it is proper to consider, in

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It is the policy of the law, that persons having only a small interest, or profit *a prendre*, shall not have it in their power to destroy the superior right of the owner of the soil, as here the commoner's right might not be worth 40s., and he might do the lord £500 damage. 1 Ro. Abr. 405. pl. 2. If the excess, in this case, be a nuisance, it is abateable only so far; as if, in building a house, I carry it so high as to become a nuisance, the whole is not abateable, but so much only as occasions the nuisance. In this case, it would be difficult for the defendant to shew precisely how many of the rabbits made the nuisance.

*Foster, J.*

It seems admitted on all hands, that a commoner cannot destroy the coney; it follows, then, by necessary implication, that he cannot destroy their burrows, which are essential to their preservation. An abatement of a nuisance, by a lord's inclosing, is only a restoring that right which the lord had before granted, and is therefore justifiable; but, in the case of an excess of this kind, the law is to judge of the measure of it.

Judgment for the plaintiff.



HOPE (on the demise of BROWN) agt. TAYLOR.  
K. B.

EJECTMENT, for a house in *Middlesex* (which was copyhold of inheritance) with its appurtenances.

The word "legacy" may be used in a will to denote a devise of real, as well as a bequest of personal property. 1 Burr. 268 S. C.

The special case stated, that *Robert Johnson*, being seised in fee of divers freehold estates, and copyhold estates of inheritance, which he had duly surrendered to the use of his will, did, by his will, dated 1st of *August*, 1729, give unto his nephew, *John Westborough* (eldest son of his sister *Taylor*), a copyhold messuage, and £90. To his three nephews, *Charles*, *Robert*, and *William Taylor*, sons of his said sister by her then husband, a close of pasture, containing 29 acres, which he willed should not be parted, or divided, but enjoyed by them in common. Then he devised a messuage to his said nephew, *Charles Taylor*; a money legacy to *Robert*; then comes the devise of the premises now in question: "My house on the green, with the ground, and buildings, thereto belonging, I give to my nephew, *William Taylor*, and also the sum of £20." Then he gives £5 to his brother-in-law, *Taylor*: and directs, that the several sums of money given by his will, shall be paid in twelve months after his death. "And if either of these persons die without issue, then their said legacies to be equally divided amongst them that survive. All the rest of my houses, lands, goods, and chattels, I give unto *Elizabeth Westborough*, whom I make my executrix."

The case further states, that *William Taylor*, the devisee, entered, and was possessed of this house, and

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died seised thereof; that the defendant, *Taylor*, is his eldest son, and heir at law; that the lessor of the plaintiff is the heir-at-law of the testator; that *Elizabeth Westborough*, the executrix, and residuary devisee, is still living.

The questions are,

1st, Whether *William Taylor* took an estate for life only, or an estate tail, by this devise?

2dly, If only for life, whether the residuary clause would carry the reversion of these premises to the residuary devisee, against the heir at law?

*Mr. Clayton*, for the heir at law.

To the first point.

This is clearly a devise to *William Taylor* for life only, as it stands in the 1st clause, there being no words of inheritance whatsoever; nor can the subsequent clause, "if either of these persons die without issue, then their legacies to be equally divided amongst them that survive," be applied to the devise of his lands; for he having given money legacies to all but one of the devisees (*Charles Taylor*), and the word *legacy* being most properly applicable to a bequest of money, this clause shall operate on the money only, and not be construed so as to disinherit an heir at law.

2d. The residuary devise did not comprehend this reversion, seeing the testator had other estates, both freehold, and copyhold, which he had made no disposition of, and on which this clause would properly operate: *Carth. 50:*

and in the cases where the residuary devise of all my estate out of settlement, or not before by me devised, have been held to pass a reversion, it was because there were no other estates for it to operate upon.

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Besides, this residuary devise would be satisfied by passing the freehold lands only; and that copyhold lands will not pass by the general devise of all my lands, &c. where the testator has both freehold, and copyhold, appears by Eq. Ca. Abr. 124.

Mr. *Nares*, for the defendant.

Mr. *Clayton* has omitted stating the first clause of the will, which is, "As to *all* my worldly estate, I give, &c." which manifestly shews, he did not intend to die intestate as to any part of it; and then follow the several devises, and bequests, of land, &c. in the manner he has stated them.

1st, That the word *legacy* is equally applicable to land, as well as to money, appears from *Godolp.*, and *Swinburn*, among the civilians, and from *Terms de ley*, title Devise, among the common lawyers. This being so, the only question is, how the testator meant it should be applied? And it is manifest that he meant the land, which he appears to have been desirous of perpetuating in his family, and not those trifling money legacies which he had given, one of which is so small as £5; for if this was his intention, then the legatees would only be entitled to receive the interest on their legacies for their lives, which could never be the testator's design, for he expressly directs them to be paid in a year after his decease.

2dly, There can be no doubt, but the residuary clause, in this case, was intended to carry all his estate, and

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interest, of what nature soever, that he had not before disposed of, as he has manifested his intention to dispose of all. As to the freehold alone having been held to satisfy such a devise, that was only where the copyhold had not been surrendered to the use of the will, as here it has.

*Reply.*

I admit, that the word legacy is applicable to land, where there are no pecuniary legacies for it to operate upon: therefore, if I make *A.* executor of my land, it has been held to pass the land to the executor; but here are money legacies, to satisfy the word.

Lord *Mansfield*, C. J.

The points, in this case, may be narrowed extremely, and reduced to this one.

Whether the word legacy, in this case, be applicable to the devise of the land? and if so, the defendant is entitled, as son, and heir in tail, of *W. T.*, the devisee.

And to determine this, no more of the will need be stated, than to shew it was of his own drawing, there not being a proper legal expression used in any part of it. He sets out with declaring an intention to dispose of all his worldly estate. The objects of his bounty are his four nephews, and his executrix, who is the *haeres factus*, or general devisee; these appear to be all the persons he intends to distribute what he has amongst, except a small pecuniary legacy of £5 to his brother-in-law.

Having given lands to all his nephews, and also money legacies to all but *Charles*, then follows the clause, "If either of the persons, before named, die without issue,

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K. B.

*Denison and Foster, Js.*, concurring, judgment of nonsuit was directed to be entered against the plaintiff.

PAXTON agt. WRIGHT, WIDOW.—K. B.

A prohibition to the spiritual court, in a cause not within their jurisdiction, is demandable of right after sentence against the plaintiff therein, and at his instance.  
1 *Burr.* 314.  
S. C.

MR. NORTON shewed cause against a rule for a prohibition to the ecclesiastical court, to stay the plaintiff's own suit after sentence against him, merely to save the costs occasioned by his own vexation.

The suit was instituted by the plaintiff, a quaker, to be quieted in the possession, and enjoyment, of a pew in the church, on a prescription of an enjoyment by himself, and all those whose estate, &c., and as having repaired. The defendant set up the very same claim in her answer to the libel, namely, a prescriptive enjoyment, and having repaired. Sentence was given against the plaintiff, and affirmed on appeal.

The ground of his present application is, that the spiritual court had no right to try this prescription.

1st, I agree, that where the spiritual courts meddle with matters concerning which they have no jurisdiction, as right to lands, &c. there a prohibition always goes, according to 12 *Co.* 105., and the cases in *Ro. Hob.* *Lutw.*, &c., cited by the other side; but this case is something different from those; for here the ecclesiastical court has, doubtlessly, jurisdiction of the

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K. B.

defendant, and, though they wished to relieve her if they could, and not grant the prohibition; yet, it appearing on the libel, &c. that it was a matter cognizable only in the king's temporal courts, and of which the spiritual courts could have no jurisdiction, *pro defectu triationis*, the court was bound in such cases, *ex debito justitiæ*, to grant a prohibition, as it was an usurpation on the royal prerogative. Besides, the whole proceedings in the spiritual court being absolutely void, for want of jurisdiction, the defendant would have no remedy to compel payment of the costs awarded to her by their sentence.

Rule for the plaintiff to declare in prohibition.

The KING agt. FREDERICK.—K.B.

Indictment  
for gaming  
quashed, be-  
cause found  
at a court of  
quarter  
sessions.

MR. ASPINWALL moved to quash an indictment against the defendant, for winning more than £20, by gaming, at one sitting, contrary to 18 *Geo. 2.* His objection was, that the indictment was found at *Hicks's Hall*, which has no jurisdiction of this offence, under the statute; power being only given to this court, the assizes, and great sessions: whereupon a rule *nisi* was granted.

Afterwards, in this term, the rule was made absolute, without any opposition.

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*Denison, J.*

The KING  
agt.

AYTHROP  
and

DUNN.

K. B.

I never remember an information, in nature of a *quo warranto*, for an office of this private nature: the statute of 9 *Ann*, relates only to corporate bodies, and franchises; it may as well be brought against one of our clerks.

It was much litigated, whether it would lie in the case of a constable (a); at last, it was held it would; but that is a public office, which this seems not to be.

*Foster, J.*, said an information of this kind had been moved for, against the coroner of the hundred of *Gower*, and the court had no doubt but it might go: though the right there, was tried on a feigned issue: and a steward of a court-leet is a much higher officer, as he is a judge of a court of record.

The motion was then put off, in order to search for precedents. And now in this term

Mr. *Norton* moved it again, and cited 1 *Str.* 622., which, he said, was a case in point, as being a court-leet, and court-baron, which the courts here are sworn to be. He also cited the case of *22 Geo. 2.*, where an information was granted against the defendant, to shew, by what authority he held a court-leet.

Whereupon a rule to shew cause was granted.

In *Michaelmas* term following, the rule was made absolute, without any cause being shewn.

(a) 2 *Str.* 1213.

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The KING *agt.* FREEMAN, Esq. and another.—  
K. B.

MR. NORTON moved for a *mandamus* to two justices of the peace for the city of *Coventry*, to proceed in a complaint against a quaker, for not paying his quota, being 11s. 6d., to a church rate, pursuant to 8 and 9 W. III.

A *mandamus* issued to justices, that they proceed against a quaker for a church-rate.

The levy was made at a vestry, held, pursuant to a public notice, in the church for that purpose; and particular notice was also given to the quakers, though, Mr. Norton said, that was an unnecessary precaution: but the justices were afraid of intermeddling, without the direction of this court.

A rule to shew cause granted.

HALL, and wife, *agt.* WOODCOCK, or LUCAS.—  
K. B.

ERROR, to reverse a common recovery. The wife of the plaintiff, *Hall*, claimed, as tenant in common, with two others, upon the death of *Peirson*, the late tenant in tail, (who suffered the recovery in question), without issue; by virtue of the will of *A.*

A plea in abatement to a writ of *sci. fa.* against terre-tenants, "that another was

terre-tenant," is not to be sustained. 1 Burr. 359. S. C. See 2 Wms. Saund. 72 p.



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 {  
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 and wife,  
 agt.  
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 {  
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The error assigned was, that *Peirson* died without issue, before judgment. To which the defendant pleaded *in nullo est erratum*.

A *sci. fd.* issuing against the terre-tenants, who pleaded in abatement, that another was terre-tenant: to this plea there was a demurrer, and joinder in demurrer.

And whether such plea in abatement was good, was the question.

Serjeant *Poole*, in support of the demurrer.

The terre-tenants are strangers to the record, and can plead nothing but a release of errors. They cannot plead, that there are other terre-tenants, because of the delay which would ensue; for, if one set might so plead, others might likewise, *in infinitum*.

Any one may, as *amicus curiæ*, inform the court, that there is another terre-tenant; and the court may, if they please, grant another *sci. fu.* to such; but this is not *ex debito justitiæ*. Besides, the plea here contradicts the sheriff's return, and, therefore, is not to be allowed. And no inconvenience can ensue to the terre-tenants, though this plea be disallowed, because they cannot be dispossessed in consequence of this judgment, but may defend their title, upon an ejectment brought against them.

In support of this, he cited the case of *Wynne v. Lloyd*, 1 *Lev.* 72. 130. 146. 1 *Sid.* 213. 1 *Keb.* 54. 351, &c. *Sir Tho. Raym.* 16. 55, as a case in point.

*Mr. Luke Robinson, e contr'.*

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writ should issue against the true terre-tenants. *Stokes v. Oliver*, 5 Mod. 209. *Adams v. Terre-tenants of Savage*, *Salk*. 601, and 6 Mod.

But here, neither the heir, nor terre-tenants, are before the court, whereas the heir should be summoned.

Serjeant *Poolé's* reply.

As to the merits of the case, the recovery on the record seems clearly bad, in fact, as *Peirson* died before judgment.

Mr. *Robinson* does not deny the authority of the case I have cited; but says, that *sci. fa.* are *ex debito justitiæ*: that I controvert. But taking it to be even so, we have sued out such writ, and the sheriff has returned a summons.

The case in *Dyer* only says, the best, and safest, way is to sue out a *sci. fa.*: I admit it; but it does not from thence follow, that it is necessary.

The case of the terre-tenants of *Savage* was, as I remember, on a judgment in debt; so that it is by no means similar to this, because all are liable to contribute in that case.

If Mr. *Robinson* will, as *amicus curiæ*, say the terre-tenants have a release, then, perhaps, that may be a sufficient inducement to the court to grant a *sci. fa.* to them; otherwise, I hope this plea will be overruled, as it is plainly calculated for delay only.

Lord *Mansfield*, C. J.

It is established in practice, that there regularly must

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and wife,  
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K. B.

As there is a demurrer, I am afraid we must only award a *respondeas ouster*. As to Mr. Robinson's other objections, we cannot enter into them at present; he is premature in making them, as he is counsel for *Woodcock* only.

Foster, J.

The sheriff has returned, that these people are tenants. One pleads nothing; the other says, he has no concern, and yet wants to be heard.

Judgment against the plea, and *respondeas ouster* awarded.

---

COGAN agt. EBDEN.—K. B.

A verdict having been delivered in for the defendant generally, by mistake of the foreman, when the jury had found on one issue for the plaintiff, and on the other only for the defendant, on motion for a new trial, &c., leave given to move to amend the *postea*, on the affidavits of the jury, &c.  
1 Burr. 383. S. C.

THIS was an action of trespass, wherein two issues were joined, to try the right to two private ways.

On the trial, the jury had agreed to find for the plaintiff as to one issue, and for the defendant on the other; but when they were asked generally who they found for, the foreman, by mistake, answered, for the defendant, without distinguishing the issues.

Mr. Baron Legge, who tried the cause, reported, that, as to the disputed issue, there was evidence on both sides, but he thought the weight of evidence was against the verdict.

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agt.

EBDEN.

K. B.

The real justice of the case here would be, to rectify the mistake in the verdict; which might be done, if there was any memorandum of the judge, that he took the verdict to be for the plaintiff. But if that cannot be referred to, yet I think there must be a new trial.

*Denison, J.*

The only point is, whether we can rectify this *postea*, which must be done if we can, for the question has been tried, and a verdict found; and as to that, there are many instances of rectifying the *postea* by the judge's notes. I remember such an amendment by my brother *Burnett's* notes (a); therefore I should think it right to have recourse again to my brother *Legge*, to know if he has any note to amend by.

*Foster, J.*

I do not see what further information we can expect by another application to the judge, who tried the cause; for it is agreed on all hands, that the jury did deliver in their verdict on both issues for the defendant, so that the associate did not mistake them, but they were mistaken.

The case my brother *Denison* mentions, was, I believe, a mistake in the associate, who did not take the verdict as delivered in.

Here, indeed, there was a plain mistake, so that I think there should be a new trial: but I should be afraid of amending this *postea*, for fear of the precedent. I do not know where we should stop.

Mr. *Hussey* then said, that though his client succeeded, and had a new trial, yet, as one issue must be found against

(a) *Str.* 1197.

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*postea* agreeable to the intention of the jury; which Mr. *Morton* accordingly did, and obtained a rule to shew cause.

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HARRIS *agt.* HUNTBACH.—K. B.

A receipt given by a guardian, for money lent to be applied to the use of an infant, and a note requesting a sum, by the same, for the same purpose, on which the receipt is acknowledged, is sufficient evidence to support an *indebitatus assumpsit* against the guardian; and a collateral promise cannot be inferred, on the default of him for whom it was furnished, he having been no party to the contract, and the defendant the original debtor. 1 *Burr.* 373. S. C.

THIS was a special case, reserved at *Stafford* assizes.

Case upon promises. The plaintiff, in his first count, declared for £50, upon a *mutuatus* to the defendant; and in the 3rd count, for money laid out, and expended, by him for *Samuel Hellier*, an infant, at the request of the defendant, which several sums the defendant promised to pay.

In order to support the first count, the plaintiff gave in evidence the following note signed by the defendant.

“ 3d *December*, 1751. Then received of Mr. *Harris* the sum of £19, which I promise to be accountable for (on behalf of my grandson), on demand. Witness my hand.”

And, to support the third count, the plaintiff gave in evidence, that one *James Davidson* went by the defendant's order to the plaintiff, for payment of some wages for the said *Samuel Hellier*, and that the plaintiff said, he would not pay the money, unless the defendant would sign the receipt, in pursuance of which she signed the following note:

" Mr. *Harris*,

" At the request of the gardener, on the report of the workmen at the woodhouses wanting money greatly, this is to certify, that it is with my request you shall pay him, on account of Mr. *Hellier*, for the workmen's use, the sum of £15, as witness my hand, *S. Huntbach.*"

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And the plaintiff paid £15 to the gardener accordingly, who gave the following receipt, under the last-mentioned note :

" Then received of Mr. *Harris* £15, in pursuance of the above order. Witness my hand. *J. D.*"

A verdict was found for the plaintiff on the first, and third counts, with £19 damages on the first, and £15 on the third, and 40s. costs; and a verdict on the other counts was found for the defendant, subject to the opinion of the court as to the plaintiff's verdict, whether the counts, or either of them, are maintained by the above evidence.

Mr. *Aston*, for the plaintiff.

Instead of a point of law, this is a matter of fact, upon whose credit the money was lent.

As to the first count. By the note given in evidence to support it, the defendant promised to be accountable, which is the same as a promise to pay. That receipt is a clear evidence, that the money was paid to the defendant, the consequence of which is, that she is liable; and the addition of the words " on my grandson's behalf," will not vary the case; for the plaintiff has not thereby any remedy against the infant, and that it is which makes the distinction between an original, and a collateral, undertaking. 2 Lord *Raym.* 1085. *Reed v. Nash*, 24 *Geo.* 2.

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As to the third count. This question will be determined on the very same ground. No action can be maintained by the plaintiff here against the infant: but the money was advanced entirely on the credit of the defendant.

Mr. Nares, for the defendant.

The question is, how far a general *indebitatus assumpsit* will lie on these notes?

In order to argue this, I shall lay down a few general rules.

All the books say, that it will only lie in cases where debt lies. *Salk.* 23. 2 *Lord Raym.* 1034.

It will not lie for an undertaking for the debt of another, nor on a bill of exchange, nor on a promissory note. 1 *Str.* 680.

The note given in evidence on the first count, is a note for money lent and advanced to the defendant; but it is plain, the money was applicable by her, for the use and benefit of the grandson.

If I receive a sum of money to be applied for particular purposes, and do not apply it accordingly, an action will lie for money had and received, but not for money lent.

The defendant here did not undertake at all events, but only if the grandson refuses to allow it: therefore, however the money might be recovered as money had and received, it cannot as money lent.

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assertion : and the inserting on whose account it was paid, does not vary the case. Who credit was given to, is the thing material, and that is a fact for the jury.

Collateral promises are only where a third person comes in aid, to get credit to the borrower : here the infant is no party to the contract, nor is he liable.

*Lord Mansfield, C. J.*

The case seems to me to be so very clear, as to make it extremely difficult to argue upon it.

The question is, whether there is sufficient evidence of a debt contracted by the defendant to be paid by her to the plaintiff?

As to the first count.

The grandson appears to be an infant: the defendant, I suppose, is his guardian; therefore if the money here received was laid out, and was proper to be laid out on the infant's account, she would be allowed it in her accounts with the infant.

This note is express and clear evidence, that she received the money, and was to account for it, which is exactly the same as to pay it on demand.

As to the other count.

The mansion-house, and garden, of an infant ought to be kept in order, and the guardian will be allowed what she properly lays out on that account.

The defendant requested the plaintiff to pay the



money; it was clearly lent on the behalf, on the credit, of the defendant; the plaintiff had nothing to do with the application of it; nor could he maintain any action against the infant for money paid on this account.

But it is said, that *indebitatus assumpsit* does not lie on a promissory note: not, I agree, if you state the note in your declaration, but surely you may give it in evidence on a general count.

As to collateral promises. If money is due from A., and another undertakes to pay the sum, if the original debtor does not: there, as I take it, a special action must be brought; but if two promise to pay originally, though one, perhaps, has all the money, and the other is only as a surety, yet both are original debtors as to the lender.

This case is stronger, for here the defendant only was liable, and therefore she is clearly an original debtor.

*Denison*, and *Foster*, Js. concurring, in *omnibus*, the *postea* was ordered to be delivered to the plaintiff.

#### HAMMOND *agl.* BREWER.—K. B.

THIS was an action of *assumpsit*, for money had, and received, to the plaintiff's use. On the trial, before Baron *Smythe*, a verdict was given for the plaintiff, subject to a case for the opinion of this court.

The case states an act of parliament for repair of the

the town of B., and from thence to C.,” the road *through* B. is excluded 1 *Burr.* 376. S. C.

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HARRIS

*agl.*

HUNT-

BACH.

K. B.

Under the description, in a turn-pike-act, of “the roads from A. to

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roads from *A.* to the town of *Battle*, from thence to *C.*, and from *C.* to *Hastings*. The toll payable under that act of parliament for waggons is 1s. In 1753 the trustees erected a turnpike at *Common Cross*: in *May*, 1756, the trustees removed that gate, and placed it in the town of *Battle*.

In *July*, 1756, the plaintiff drove his waggon along a road not within the turnpike-act, to *Battle*, and was required to pay, and did pay, 1s. for passing through the said gate in *Battle*, for the recovery of which 1s. this action is brought.

The case further states, that the pavements in the town of *Battle* were repaired some years since, and before the turnpike-act obtained, by subscriptions, and that they have not since wanted repair.

The question is, whether this act of parliament extends to the road through *Battle*?

Mr. *Knowler*, for the plaintiff.

The word *through* is mentioned in all places but the towns, and when it speaks of them, it is, "from the town of *A.* to the town of *Battle*, and from the town of *Battle* to the town of *C.*," but not a word of through either of those places: and the reason, as to the town of *Battle*, is plain, because they had been at a great expense in repairing their pavements.

The trustees had power to erect gates on the *said* roads, which, to be sure, can only mean the roads before-mentioned; and the description of them, I apprehend, does not take in the town of *Battle*.

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repair of the road from *Flimwell Vent*, to the town, and port, of *Hastings*;" and within that compass this town of *Battle* lies.

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 K. B.

I have a parliamentary interpretation of these words: it is in an act of 11 *Geo.* 2. for repairing several roads leading to, and from, the town of *Derby*. Two roads lead to *Derby*, and two from it. It was there taken for granted, that the town of *Derby* was to be repaired under that act, for provision is made out of what tolls those repairs were to be done.

Mr. *Knowler*, in reply, observed, that *thence* must refer to the antecedent, which is the town of *Battle*.

Lord *Mansfield*, C. J.

The act seems to me to have been penned pretty accurately, on purpose to exclude the road lying within the town of *Battle*.

I will consider, 1st, the reason of the thing. 2dly, the words of the act of parliament.

As to the 1st.

It is no indifferent thing, whether a gate shall be erected in a town, or not; this very case proves that, for the plaintiff here appears to have paid, without going a yard upon the road.

Again, there was no occasion to include this town in the act; it was not founderaus, and in bad repair, but the road through it was in good order; and the trustees have never contributed to the repair of this road.

BALDWIN, and wife, agt. BLACKMORE, Esq.—  
K. B.

On a special case from *Lancaster* assizes.

Husband, and wife, having returned, without a certificate, to the parish whence they were removed, and the wife been committed to prison with him, in consequence: held, that she is not liable to punishment under the vagrant acts, for having accompanied her husband in his return; and the warrant of commitment not being for the term, or purposes limited in the statutes, is adjudged to be void.

1 *Burr.* 595.  
S. C. and see  
3 T. R. 725.

TRESPASS for false imprisonment of the wife.

The case, as stated, was thus: the plaintiff was a poor man, settled at *B.* in *Yorkshire*; that he, and his wife, coming to *Marsden*, in the county of *Lancaster*, were removed from thence, by order, to *B.*; which order was never appealed from. That, some time afterwards, they returned to *M.* without bringing any certificate. That the defendant, (a justice of the peace, for *Lancashire*), being informed of this, on the oath of *A. B.*, a credible witness, issued his warrant to apprehend them: that on the 8th of *Febr.*, 1753, they were arrested, and brought before the defendant, when *J. M.*, one of the churchwardens of *M.* (a competent witness in that behalf), proving the removal, and return, the defendant thereupon committed them to the house of correction; and then it sets out the *mittimus*, which was, to the master of the house of correction, to receive, and keep, them, *until discharged by due course of law*: that they were committed on the 12th of *Febr.*, and continued in prison until the 7th of *March*: that a month's notice was given the defendant of bringing the action.

Verdict for the plaintiff, and 1s. damages, subject to the opinion of the court on this case.

Mr. *Yates*, for the plaintiffs.

Two points are made in this case.

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1. Murder, and other atrocious crimes.

2. The wife's voluntary acts of her own head, in her husband's absence.

3. Acts of force, fineable to the king, as ravishment of ward, &c.

4. Where the offence might be committed by the wife alone, or where the law would be evaded, if she was not punishable; as keeping bawdy-houses, selling gin, &c.

But this falls under none of those classes; she here only followed her husband, which it was her duty to do.

As to the other point, whether there should not be a previous conviction?

The words of the act of parliament are express, "*being thereof convicted*;" but if those words had been omitted, still a conviction would have been necessary. 1 *Hawk.* c. 10. § 8.

*Magna Charta*, and universal reason, require that a party should be found guilty, before punishment is inflicted. This commitment of the wife is in nature of an execution, and judgment should, in all cases, precede execution. The charge of the act of vagrancy here, is only in the recital of the words of the witness, and a complaint without adjudication, is not sufficient.

Mr. Clayton, *e contr'*.

The defendant has acted in this matter, as a magistrate,

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Mr. *Yates*, in reply.

BALDWIN, I may admit almost all Mr. *Clayton's* argument, without prejudicing my client.

agt.

BLACK-  
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K. B.

The question is not, whether a *feme covert* can commit an act of vagrancy, but whether residing with her husband, as in this case, is an act of vagrancy.

The statute law cannot be more general than the common law; yet the common law has exceptions, to which its general rules do not extend: and statutes which make offences without benefit of clergy, always, impliedly, except lunatics, &c.

As to the 2d point,—The words in the defendant's warrant, "against the form of the statute," are the words of the informer.

Lord Mansfield, C. J.

I lean extremely against this action, because the justice does not seem to have meant ill; had the cause, therefore, been tried before me, I should have been satisfied, if a jury had found a general verdict for the defendant.

The question of law is, whether a wife is liable to be sent to the house of correction, for coming back to a parish *with her husband*?

I shall not enter into the general learning on this head.

This question will depend on two statutes, 13 and 14 *Car. 2.*, and 17 *Geo. 2.*, for the defendant has not, in his warrant, confined his proceeding to either singly, though he seems rather to have proceeded on the statute of *Car. 2.*

1757. *Denison, J.*

**BALDWIN,** This is a hard action: however, we must determine  
and wife, upon the question as stated to us.  
*agt.*

**BLACK-** I think, under the 17 *Geo. 2.* there ought to have been  
**MORE.** a previous conviction. But this warrant seems to me to  
**K. B.** have been upon the 13 and 14 *Car. 2.*

I have some little doubt, whether the offence described by 17 *Geo. 2.* can now be punished under 13 and 14 *Car. 2.*, because the return must now be *without a certificate*. I am, indeed, inclined to think it may, but am not quite clear; but, taking it to be so, I think the warrant is good in form, under 13 and 14 *Car. 2.*

As to the other point: if the wife returned without her husband, I have no doubt but she would be punishable; but, I think, she is excused in this case, as she returned with her husband; because she is bound to cohabit with him for better, and worse.

But I choose to consider, before I give a final opinion.

*Foster, J.*

The question is not, whether the wife can be guilty of an act of vagrancy with her husband; but it is, whether she is criminal, for living at the place of her husband's residence?

The *paterfamilias* has a right to determine where the place of abode of his family shall be.

If the words of the act of 17 *Geo. 2.* are to be taken in their utmost latitude, it would take in infants, but that, I think, is not contended.

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Serjt. Poole.

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and wife,  
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As to the 1st point, argued to the same effect with Mr. Yates, and added—Supposing this to be a proceeding on the statute of *Car. 2. c. 12. 3*, as that act subjects the parties offending against it to great punishments, a tight hand ought to be kept over justices.

But I submit it, that this cannot be understood to be a proceeding under the statute of *Car. 2*. The warrant, it is true, is confined to neither statute; but the information upon which the warrant is grounded, is clearly on the 17 *Geo. 2.*, and that act has altered the law from what it was under the stat. of *Car.*, and is a partial repeal thereof.

2. The statute comprehends all persons who shall *unlawfully return*, that expression supposes, that one may do it *lawfully*.

The question then is, whether the wife's return with her husband is not lawful? Surely all laws give the wife leave, and she is bound by her marriage-contract to cohabit with her husband; he is the head of the family, and is to fix the place of their abode. A wife is considered to be so *sub potestate viri*, that in case of theft committed in company of the husband, the law excuses the wife; that is an offence, but this is none; therefore, *a fortiori*, she ought not here to have been punished. 1 *Hawk. P. C. 3. Bro. Cor. Pl. 108. Keb. 31. 37.*

Mr. Norton, *e contr'*.

1. If a conviction was necessary, it was not necessary to be stated in this case: it will be sufficient, if the justice draws it up, when a *certiorari* goes to him to bring it up. The question is, whether there are not facts sufficient



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*agt.*BLACK-  
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K. B.

Apply this doctrine here. All persons are prohibited from returning: the vow, therefore, does not oblige her to accompany him in that unlawful act. Is she to go for sustenance? no, the parish where she remains would be obliged to maintain her: if not for that, surely not to cherish him who is breaking the law. But see further, what inconveniences would ensue to the innocent parish removing. How could they dispose of the woman? If they sent her back by another order, at a new expense, to a distant place, she would be in no better plight and condition, than when she left it to follow her husband; and even then she might again return, if the matrimonial vow is taken in its full extent.

This act of 13 and 14 *Car. 2.* may be considered in another light (and that it is not under 17 *Geo. 2.* further appears, because the commitment is for an indefinite time, *till delivered by due course of law*: so they were bailable; it is not in execution, for hard labour, or correction): the statute of *Car. 2.*, I say, only meant the punishment as for safe custody, to be punished at a future time by indictment, or otherwise; for labour, which all poor people must perform, cannot be deemed a punishment. If sending her to the workhouse, would not be penal, neither can sending her to the house of correction, because the alternative is given. Innocent people are daily committed for safe custody, until further examination.

It is harsh to say, that the husband here shall recover damages for that usage to his wife, for which, when done to himself, he could not maintain an action.

The C. J. observed, that he thought the statute of *Car. 2.* was tied up to harvest people.

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the commitment to be, for hard labour, or by way of punishment; or else he proceeded, as I presume he did, on 17 *Geo. 2. c. 5.* which warrants a commitment for any time not exceeding one month. Here no time is fixed, and therefore the commitment is illegal. And, indeed, this statute is a repeal of that of *Car. 2.* as to such cases as fall within it: therefore, the court must (though with reluctance, as, from the expense that has attended this prosecution, it is manifest, that some other persons than the plaintiffs are concerned behind the curtain), proceed to give judgment, and therefore the plaintiff must have the *postea*.

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*Trin. Term,*  
30 and 31  
G. II.

TAYLOR agt. RONDEAU.—K. B.

An annual officer of an hundred, to which the privilege of holding a fair, has been granted, may prescribe to hold it, although not a corporation.

THIS was an action for money had, and received, to the plaintiff's use; and on the trial, at the assizes for *Kent*, a case was made for the opinion of the court, which *Willes, C. J.* (who tried the cause), stated from his notes, as the counsel could not agree on the facts.

The case states, that there is an ancient, annual, officer of the hundred of *Middleton* in *Kent*: that he is no corporation, but called a port-reeve; that the said officer, for the time being, has, from time immemorial, held a fair on *Martinmas* day, and the two following days, at *Sittingborne*, in the said hundred, in a field there; sealed the measures used there, taken care that peace, &c. was preserved, and provided stalls, &c. for the use of persons frequenting the fair.

That he has taken 1*d.* a foot, for every foot in front of

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 TAYLOR  
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 RONDEAU.  
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It was objected at the trial, that the plaintiff is an annual officer, and no corporation, and therefore cannot prescribe: but that that assertion is not law, is clear: *Latch.* 87. 2 *Bulst.* 201. *Moore*, 835. S. C. And it is well known, that officers of courts of justice may bring actions for their fees, though they are no corporations; and so also may persons in other offices.

2. As to the 2d question. It was said, that if we had any lawful demand, we must proceed against the stall-holders; but, as they have paid the defendant that which we were entitled to, he is clearly liable to us.

The court stopped Mr. *Knowler*, who was going to argue on the other side, as they said, the case was imperfect: evidence, and not positive facts, being stated. But, however, they intimated their opinion as follows:

Lord *Mansfield*, C. J. seemed clearly to think, that the hundred might have this franchise by prescription, to be enjoyed by the hands of this annual officer.

*Denison*, J. said, that supposing it could not be good by way of prescription, yet it might by way of custom, if the action had been brought in that manner.

*Foster*, J.

There are numberless instances of grants of franchises of this sort to hundreds, &c.; and boroughs not corporations, prescribe to send members to parliament: He referred to *Madox's Firma Burgi*.

Stands over, for the case to be more perfectly stated from Lord C. J. *Willes's* notes.

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agt.

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about £100, or between £100, and £200: that she paid 5s. a week for her board, which amounted to £13. 10s. *per annum*, exclusive of apparel, &c.: that, after this supposed defeasance, the testatrix offered to call in the money she had lent *Eynon*, if the witness would take it at the same interest, for that *Eynon* was no more to her than another man: that, after this, when she boarded in *Hertfordshire*, she applied several times to the witness to write to *Eynon*, to demand payment of the money, *for that the interest was not sufficient to maintain her*; that the defendant having received a legacy of £150, bequeathed to his wife, (late *Rebecca Bright*, who was sister to the plaintiff, and also an intimate acquaintance of the testatrix, and, in a former will, appointed executrix, and residuary legatee); the wife said, “Now you have received this money, *you had better pay Mrs. Crisp the money you owe her*, for it may be called in, when you may not be able to raise it.” To which he answered, “Do not be uneasy: I cannot be surprised: I must have six months’ notice to pay it.”

There was other evidence, touching a *caveat* entered by the defendant against proving the last will; and a declaration by the defendant, that if the plaintiff would give up the note, the defendant would withdraw his *caveat*. Also, that a friend of the defendant proposed to the plaintiff to split the difference, and halve the note (but this offer was of his own head, and without authority from the defendant).

The defendant, by way of rejoinder, endeavoured to account for all these facts, by a construction of the defeasance-note, that it was not binding as against *Mrs. C.*, and that she might have called it in, in her lifetime; but, if she omitted to do so, it would bind her executor, in the nature of a testamentary donation; and produced his

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in this case, that was a matter proper for the consideration of the jury in this common law trial, and they have a concurrent jurisdiction with a court of equity as to matters of fraud, in case they are proved; though not the same means of getting at frauds, consisting of complicated facts, as the court on the other side of the hall may have.

On this principle being granted, let us proceed to examine, whether any fraud is disclosed by the above evidence.

1. Here is fraud apparent on the face of it. The circumstances of the testatrix: her necessary, annual, expenses, more than the interest of her whole fortune: no particular friendship for the defendant. It being agreed, that the money was originally a loan only, yet, in ten days after, this defeasance is given: yet, the defendant does not pretend, that this was designed to be a gift, but founded on a consideration. But, on his own evidence, the consideration fails: 1st, The transaction was long anterior to the subsequent marriage of the defendant with the testatrix's friend, *Rebecca*, his now wife. 2dly, The agreeing to pay *5 per cent.* during her life is no consideration: the original note carried that rate of interest, and considering it as a mere personal security, and the defendant not appearing to be in great circumstances, the interest is not too high; so it is plainly founded on a false consideration. Besides, it is all wrote by the defendant, and no friend, or attorney, for the testatrix present, nor any subscribing witness. Why was it not indorsed on the original note, and to remain in her own custody? Thus much on the face of the transaction.

2. On the plaintiff's evidence.—It is positively proved,

that the defendant never disclosed this defeasance to any body during Mrs. C.'s life, not even to his own wife, as appears from the discourse between him and her about paying off the original note.

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3. On the defendant's own evidence in the rejoinder.—It was not considered as an absolute defeasance, so as to bar the testatrix in her lifetime, but only as against her representative. And admitting this to have been her meaning, she was grossly imposed upon, for the defeasance is absolute against her.

This is not, therefore, so much a verdict on contrariety of evidence, as a wrong conclusion by the jury, on facts agreed to by both sides.

The question then is, whether, on the circumstances of the above case, there ought to be a new trial, or not?

I have attended to the arguments, forcibly, and properly, urged from the bar, extolling trials by juries: that they are the proper, and only, judges of the facts; that they may have a private knowledge of facts, &c. to which a judge may be a stranger, &c.

But I am of opinion, that if the courts of common law had not power to grant new trials, and have the question again examined into (though a verdict had passed), trials by juries would never have subsisted so long as they have done; so necessary is this power to the attainment of justice—so beneficial is it to the people.

Those who argue from positive institutions, as though they were always founded in natural reason, are under a mistake. To the right understanding of the law, a com-

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petent knowledge of history, and of that part of philosophy called ethics, is absolutely requisite: and though writers, when they are treating of a favourite subject, are apt to extol it, as founded in principles of natural reason, as my Lord *Coke* does as to every principle of the common law, and, amongst others, in this case of trials by juries, yet this is a mistake, for positive institutions are founded on human policy, and the circumstances of the times, &c. So, as to the institution of trials by juries, they were adapted to the times, and the then state of things, which have not subsisted for many centuries. They were set in opposition to trials by ordeal, or battle: at a time when there was little commerce, few deeds, and those depending on single, plain, simple facts, and concerning matters of small value, or consequence. But, for some centuries past, by increase of commerce, &c. matters of the greatest consequence, and containing a variety of intricate facts, are become the subjects of this sort of trial; and, therefore, though they are permitted to stand, from the real, and intrinsic, excellence of them, yet, to prevent the inconvenience, in modern times, of tying down the party absolutely by the verdict of a jury in all cases, courts have been more liberal in granting new trials than formerly; and, seeing a general verdict includes both the law, and the fact, if the party had no other remedy but an attain, that would be utterly inadequate; 1st, because of the difficulty of convicting jurors in such cases, and, 2dly, there may be many cases where an unrighteous verdict may be given, and yet the jury not guilty of any crime, nor liable to an attain.

It has been said, that the first new trial was in 1655; but this is not so, as appears both from reason, evident necessity of the thing, and from authorities. It was said by *Holt*, C. J. that the old books laying it down

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one, where the jury have given a verdict against the opinion, not only of a single judge, but of the whole court: and, therefore, that rule is now departed from.

There is one thing weighs much with me, why the court should interpose, and exercise their discretionary power, in cases properly circumstanced, which is, that the end might be attained (though at a great expense, and delay) by an application on the other side of the hall. But it must be remembered, that all presumptions, arising either out of the evidence, or from the nature of the question, must be construed favourably in support of the verdict; therefore, the judge certifying only, *that he thinks the weight of evidence was against the verdict*, or, *that, if he had been on the jury, he should have been of a different opinion*, this would not be a foundation for a new trial, as was lately determined in a case tried before Serjeant Willes, (now C. B. of Ireland); and, therefore, it is proper, that a special report should be made, to shew the foundation of the judge's dissatisfaction, that the whole court may judge whether it is well grounded, or not.

Apply these principles to the case of fraud, which is not properly a fact, but a construction of law drawn from it, *ex. gr.* If tenant for years enfeoffed his son and heir, or if tenant for life levied a fine, the law construed it to be a fraud, and it was not left to the jury to determine. So is *Fermor's* case, and all the cases there instanced out of *Dyer*. If a man buys a thing in market overt, *knowing* that the other stole it: so if one executes a conveyance of his goods, but continues in possession: the law draws a conclusion of fraud from these facts; and in this the courts of common law have concurrent jurisdiction with the chancery, who never direct an issue to try, whether



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I take it, that though there be contrariety of evidence, yet if the scale preponderates greatly against the verdict, there may be a new trial. But where the scales hang nearly even, I shall always incline on the side of the verdict, according to that constitutional maxim, *ad questionēs facti respondent juratores*; and here, had the question turned on the point of forgery, I think there would have been no ground for a new trial. But it depends on the consideration, and imposition, and certainly the common law courts have conusance of this. In the late trial at bar in this court, in the case of *Wyndham*, and *Chetwynd*, there were four issues: 1st, whether the will was duly attested; and on that there was a special verdict: 2dly, whether he was *compos mentis*: 3dly, as to the devise to a boy, which he took to be his son: 4thly, as to the annuity to the supposed mother of the boy. And, though the jury should have found for the plaintiff on the two first issues, and so have established the will, yet, as the testator was grossly imposed upon as to the boy, and his pretended mother; as, in fact, she never had any child, but borrowed the boy of a neighbour; the court directed the jury to find *non devisavit* as to the two last issues, and they found accordingly.

The question here is only, whether there is sufficient evidence of fraud, and not as to the facts, which are found, and agreed on, even by the defendant's own evidence. And, indeed, I think, that this transaction carries with it almost every badge of fraud. 1. Here is no consideration. 2. The circumstances of the poor old woman. 3. The defendant's behaviour in never discovering the note to any body during her lifetime; for the answer he gave to his wife is entirely consistent with the first note, but

## NOTES OF CASES IN K. B. &c.

repugnant to the second. So that the jury have drawn a wrong conclusion from the facts agreed to by all the parties; and here is not properly any contrariety of evidence.

Rule for a new trial made absolute.

Mr. *Gould* then urged, that, to do the plaintiff complete justice, he hoped it would be without costs, (though his original motion was in the common way, on payment of costs), and mentioned a case in *Str.* to that purpose. But the court would not hearken to him—so the rule was made absolute on payment of costs.

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**MICHAELMAS TERM, 31 Geo. II. 1757.**

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**Sir ROBERT HENLEY, Knt. Lord Keeper of the Great Seal.**

**Sir THOMAS CLARKE, Knt. Master of the Rolls.**

<b>WILLIAM, Lord MANSFIELD, C. J.</b>	}	<b>Justices of the King's Bench.</b>
<b>Sir THOMAS DENISON,</b>		
<b>Sir MICHAEL FOSTER,</b>		
<b>Sir JOHN EARDLEY WILMOT,</b>		

<b>Sir JOHN WILLES, Knt. C. J.</b>	}	<b>Justices of the Common Pleas.</b>
<b>Sir EDWARD CLIVE,</b>		
<b>HON. HENRY BATHURST,</b>		
<b>HON. WILLIAM NOEL,</b>		

<b>Sir THOMAS PARKER, Knt. C. B.</b>	}	<b>Barons of the Exchequer.</b>
<b>HON. HENEAGE LEGGE,</b>		
<b>Sir SYDNEY STAFFORD SMYTHE,</b>		
<b>Sir RICHARD ADAMS,</b>		

**CHARLES PRATT; Esq. Attorney-General.**

**HON. CHARLES YORKE, Solicitor-General.**

## NOTES OF CASES IN K. B. &c.

*Michaelmas Term, 31 Geo. II. 1757.*

A. CROSS *agt.* J. CROSS, and TURNER.—K. B.

LORD Mansfield, C. J.

THIS is an application to the court by *A. Cross*, complaining of oppression, and a bad use made of the process of this court by *Turner*, and *Manlove*, his attorney, and the grounds of the complaint are of two kinds.

1. The facts which ended in getting a bill of sale of the plaintiff's goods, without any good consideration.

2. The behaviour of *Turner*, and his attorney, at the trial of the cause, by preventing the true merits from being tried, whereby the plaintiff was nonsuited.

The court sets aside a nonsuit, and gives summary redress, where the ordinary course of practice has been rendered subservient to the promotion of unjust designs.

The case is thus:—In 1739, *A. Cross* failed, and his creditors agreed to a composition, on his making over a real estate, which he had, to trustees, for the benefit of the creditors, and agreed to clear, and discharge, him as much as if a commission of bankruptcy had been taken out against him, and he had obtained his certificate. Accordingly, an assignment was made, and amongst his creditors *Turner* came in, and signed the agreement, and thereby his debt was absolutely discharged as against *A. Cross*, and his only remedy against the trustees for the creditors. Under

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this agreement *Turner* acquiesced till 1754, when he thought fit to bring an action against *A. Cross* for this old debt: obtained judgment, took out a *fi. fa.*, and took the goods now in question in execution: never sold them, but had kept possession of them for more than a month, when *John Cross*, a *bonâ fide* creditor, arrested *A. C.*, who being in custody, offered, in order to obtain his liberty, to give *J. C.* a bill of sale of these goods; but *Manlove* (who was attorney for both *Turner*, and *J. C.*) opposed it, unless it was made to *Turner*, and *J. C.*, in moieties, which was at length agreed to, and a bill of sale made, not in the common way, as a satisfaction of their debts, but as purchasers, viz. in consideration of £50 a piece paid by them to *A. C.*, so that it does not appear to be a satisfaction for their demands.

The goods were accordingly appraised, and sold by *Heath*, the auctioneer.

After this, *A. C.* brought his action of trespass against *Turner*, for taking these goods; but, at the trial, the sole question being, whether *Turner's* debt was subsisting at the time of obtaining the bill of sale, and the plaintiff producing only an attested copy of the agreement for composition, which *Turner* had signed, and also a counterpart of the deed, executed by the trustees, but not shewing, that he had given notice to the proper persons to produce the original, the copy could not be given in evidence; and the defendant unfairly taking hold of this strict legal advantage, the plaintiff was nonsuited, without entering into the merits. And this rule of evidence is, in general, a very proper one, and to be adhered to, that neither a counterpart, copy, nor contents of a deed by parol, shall be received in evidence, without shewing a reason why the original cannot be produced; but, by a law older than

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But I think, that if *J. C.* has received more than half the money arising from the sale of these goods, he ought not to refund any thing, as he is a *bonâ fide* creditor; and if he has not received so much as half, then that half be made up to him, and the remaining half paid to *A. C.*

*Wilmot, J.* agreed, and said, the court always had, and he hoped ever would, relieve, in a summary way, against a prostitution of the process of the court to unjust purposes: and that the defendant's shelter behind a strict rule of evidence, ought not to skreen him.

Rule, according to the alteration proposed by *Foster, J.*

### The KING agt. WILLIAMS.—K. B.

A charge of having held a court in a corporation, in the absence of those to whom by office the right of presidency belonged, does not amount to that of an usurpation of a franchise, within the

stat. 9 *Ann.*, c. 20: and a judgment on that act having been pronounced after a verdict on an information in which that allegation was preferred, is reversed in error. 1 *Burr.* 402. S. C.

ERROR on a judgment in the court of great sessions in the county of *Denbigh*, on an information, in the nature of a *quo warranto*, brought by *William Wright*, the prothonotary of that court, against the defendant, at the relation of *John Mostyn, Esq.*

The information states, that the town of *Denbigh* is an ancient borough. That 14 *May*, 15 *Car. 2.*, the king incorporated it by the name of the aldermen, bailiffs, and burgesses, and appointed two aldermen, two bailiffs, and two coroners. That a court of record of right ought to be held before the two bailiffs, or one of them, on

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they exercise, or claim, such office, or franchise: now the word franchise, used in the title of the act, must be construed, and explained, by the body of the act, which plainly confines it to the claim of the freedom of burghesses; therefore, the only intrusions intended by this act, are into any office concerning the government of the corporation, or the usurping the franchise of being a freeman.

Here no right to any office, or freedom, is tried, nor any amotion, or judgment of ouster, but "that the defendant do forbear," &c.

Here is no direct charge of an usurpation, but rather matter to have supported it in evidence to a jury, in case it had been properly charged.

Here no usurpation can be collected, unless by arguments, and inference, which is ill. *Hawk. P. C.* 261. *Rex v. Knight, Salk.* 375. *Lord Raym.* 527, where the matter was almost a necessary conclusion, yet, being argumentative, it was held bad.

That the defendant held a court, which could not properly be held by any but the bailiffs, therefore, that he usurped the office of bailiff, may seem to imply a charge of usurpation, but is only by way of argument. The word *officium* is the same as duty, and does not consist of any single act, but comprehends his whole duty, and, therefore, had it been directly charged, it amounts to no more than that he held a court on the 13th of *December*, which was only a part of the duty, or office, of a bailiff, but the usurpation must be of the whole office.

If the right to the office could not be tried on this in-

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for a misdemeanour, (to which not guilty, generally, would be a good plea), would have left the crown in the dark what his claim was; and, for this reason, *non usurpavit* is no plea, but the defendant must set out his title, or disclaim any title. 3 *Leon.* 184. *Lucas*, 210. 217. 299. *Godb.* 91.

The body of the act describes the offence, and not the title: therefore, there must be an express charge of an usurpation, otherwise there is no foundation for the prayer of amotion, for it is absurd to pray, he shall be amoved, because he exercised the office six years ago, by the single act of holding the court for one day. Here the prayer is equivocal, (*said court*), which may mean either the court in general, or the particular court on the 13th of *December*; which last must be taken to be meant here, because that is the whole the information has charged. In *Godb.* 91. and 3 *Leon.* 184., it is held, the defendant must answer as to his claim, as well as to the exercise; but here neither is directly charged.

*Mr. Hall, e contr'.*

The statute of *Queen Anne* is a remedial one, and to be liberally expounded: the intention of the legislature was, that corporation disputes should be brought as near as possible to the nature of civil suits, and either party proceed at the hazard of costs; therefore, the statutes of jeofails, and amendments, are held to extend to them. So, by equity, this statute should extend to all cases within the spirit, though not within the strict letter.

As to the charge of usurpation being only by argument, or inference; here is a direct, positive, charge of what amounts to an usurpation, and conveys the same idea,



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act was plainly to comprehend both these; for as before, the only remedy was by information at the king's suit, though, by the frequent sittings of parliaments, and the crown having granted out these franchises to some one or other, the dispute was rather of a civil nature, between the contending parties who had the right, than any wrong done to the king, who had granted out the franchise: this act, therefore, puts it, as near as may be, on the foot of a civil action, and gives costs according to the event of the suit, that so the right between *John*, and *Thomas*, may be decided; but does not extend to every usurpation of offices, which may be out of a corporation, as stewards of leets, &c. The act is uncommonly clear, and express, as to this point, and the word "franchise" in the title (which is no part of the law, but only an epitome of it, and rather the province of the clerk to settle; and is never read but once, nor the question put concerning it, until the law is passed), must be interpreted from the body of the act, which plainly restrains it to freedoms, &c.

There can be no doubt but acts of parliament are to be expounded by equity: that is, have a sound construction put upon them, according to the meaning of the legislature, who cannot include every particular case, nor set forth all the exceptions; so that persons not within the letter may be within the meaning, and others within the letter, may not be within the meaning: as in a case mentioned by some of the civilians, where, a law being made, that none should draw blood in the street, one falls down in the street of an apoplexy, a surgeon bleeds him there: this is within the letter, but not the meaning, of the law.

Here I lay out of the case all that part of the argu-

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The statute only extends to offices which affect the right of sending members to parliament, or other offices, or franchises, *i. e.* freedoms; not to pretended rights, though they are usurpations on the crown.

The common law judgment is right, therefore that must be affirmed, and the other reversed, and that may be done.

*Foster*, and *Wilmot*, Js., of the same opinion; and *Foster*, J. added, that he had heard Judge *Powell* say, he framed this act of parliament, and had the perusal of it: and it was carefully done. He also added, that he took this to be a law which might not be extended by equity.

Statute judgment, as to costs, reversed. Common law judgment affirmed.

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SHEEPSHANK *agt.* LUCAS.—K. B.

The  
vouchee's  
death, who  
was also ten-  
nant in tail,  
before judg-  
ment in a re-  
covery, as-  
signed for  
error by a  
remainder-  
man bring-  
ing a writ of error, is held a sufficient cause for its reversal; and an averment of that fact in the writ, to be consistent with the record declaratory of vouchee's appearance by attorney. 1 Burr, 410. S. C.

ERROR to reverse a common recovery.

The error assigned is, the death of *Peirson*, the vouchee, before the return of the writ of summons. Plea, *in nullo est erratum*: demurrer, and joinder.

The writ of error suggests, that *Broadbent* devised and that *P.* was tenant in tail under that devise.

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are brought, because the court of Common Pleas will amend almost any thing to support them.

No one can maintain a writ of error, but those who are parties, or privies, to the judgment, and none are such but heirs, executors, and administrators. Here it is brought by neither parties, nor privies, but by a husband, and wife, claiming a remainder in right of the wife, expectant on the determination of an estate tail to *Peirson*, the vouchee.

It does not appear, that they have any right to the land, for there is no averment, that *Broadbent*, the deviser, is seised in fee, which ought to have been stated, that the defendant might have an opportunity to traverse that fact.

Another objection is, that no *sci. fa.* has issued, to give warning to the heir of *Peirson*, which is necessary in all real actions, as he may plead his age, and pray that the parol may demur; he may counterplead the plaintiff's title, &c.

Here the only defendant is *Lucas*, the recoveror, and he is no more than a nose of wax: it signifies nothing to him what becomes of it.

Again, I should be glad to know, what judgment they want to reverse? The judgment here is, for *Lucas* to recover against *Cooper*.

If there is any thing wrong in the proceedings, it is at most an irregularity only; and application should have been made by motion to the court of Common Pleas, to redress it.

No judgment is given against *Peirson*, though the error assigned is, that he was dead before, &c.

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record, he will find, that he is to recover over against Peirson, &c.

The concluding with an averment, is agreeable to the precedents, and to common sense. The defendant may not think fit to controvert the fact, but submit the matter of law upon that fact to the court, in the nature of a demurrer (as he has here done), and should not be driven to an issue of fact, *volens volens*. If he had thought fit to controvert the fact, he might have denied it, and concluded to the country, and then the plaintiff must have joined issue; and if there be any case to the contrary, it is singular, and absurd.

Lord Mansfield, C. J.

This is a very plain case in every part of it.

The donor's title is nothing to the present question, nor need be alleged any further than to shew the connection between the estates of the tenant in tail, who suffered the recovery, and the remainder-man, who brings the writ of error; and who, if the recovery stands, loses his estate: therefore he is affected by the judgment, and may bring error.

The averment does not contradict the record, as that mentions only an appearance by attorney; besides, the point was settled in *Wynne v. Wynne*.

The serjeant's distinction as to the conclusion is a right one.

No precedents are produced of a *sci. fa.* to the heir, but only to the terre-tenants, that they may not lose the possession without being warned, as they may have a release to plead. There are no precedents of warning

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reversed, and the party be restored to all that he has lost thereby."

BENNET, *qui tam* &c., agt. SMITH.—K. B.

The court refuse to set aside a *non pros.*, regularly signed in an action brought by a common informer, on a penal statute, where no intention is shewn of making reparation to the injured party, and the defendant's liability would be revived by acceding to the motion.

1 Burr. 401. S. C.

THIS was an action of debt for £10,000, on the statute of usury, brought by a common informer. Judgment of *non pros.*, for want of the plaintiff proceeding, had been regularly entered up, which the plaintiff now moved to set aside, upon payment of costs, as it was owing merely to a mistake of the plaintiff's attorney's clerk, and as the plaintiff was out of time to bring another action.

Sir Richard Lloyd, for the defendant, said, it was unprecedented to do it in the case of a penal statute: and that, upon the same principle, courts of equity would not relieve in case of subtraction of tithes, &c. unless the plaintiff waived all penalties.

Mr. Nares, on the same side.

This differs much from what the case would have been, if the action had been brought by the party grieved. It is not a sufficient reason, to say, that the time for bringing this action would be lapsed. If the party injured brings the action, penal statutes are considered as remedial, under the statute 21 Jac., for laying the action in the proper county. 2 Hawk. P. C. 268. Cro. Eliz. 434. *Wynn, Bart. v. Myddelton*.

But, as to common informers, it is otherwise. New trials are never granted on their behalf, nor is any other particular favour shewed them. *Maddison v. Andrews*.

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him to revive the prosecution. He asks it, I say, as a favour, for he moved it upon payment of costs, therefore he admitted the regularity of the *non pros*. He asks it, without shewing any equitable circumstances to induce the court to grant it, and therefore, I think, it ought to be denied in this case.

As to the case *Mr. Norton* cited, which was an amendment at common law, whilst the proceedings were in paper, there is, I take it, no difference between penal statutes, and others.

*Denison, J.*

The sole ground for setting aside judgments, &c. in civil actions, is the putting the other party in as good a condition as before: therefore formerly the court refused to do it, if a trial had been lost; but now they do it on consent that the judgment (if it passes against the party applying), shall be entered *nunc pro tunc*. So they have restrained the party from pleading the statute of limitations, or the insolvent debtors' act, and confined him to such pleas as would bring the true merits to be tried; but never have suffered it, where it would put the adverse party in a worse condition: which would, most certainly, be the case here, where the defendant has discharged himself from the penalty by a regular, and legal, judgment of *non pros.*; and the reason urged for granting this application (that the plaintiff is out of time to bring another action), weighs strongly with me against it; for, the cause being out of court, and the penalty thereby saved, the court can never restore it, without putting the defendant in a worse condition.

This case differs widely from amendments before judgment, whilst all is in paper, which was the case *Mr. Norton*

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year, for the particular purpose of electing b  
 ensuing year, on the 29th of *September*, to p  
 general business of the corporation; and al  
 power to meet at any other times when the b  
 see necessary, previous notice being given  
 extraordinary great court. Custom, that portm  
 chosen by the others, or residue, or the maj  
 of the burgesses, in a reasonable time after  
 That it is the duty of the portmen to atten  
 court, to advise, and assist, the bailiffs in the  
 of the corporation.

That, on the 8th of *September*, 1755, *Jamès*  
 nine others, were the ten surviving portmen  
 having been several great courts, at which  
 said portmen, except *Wilder*, attended, and  
 attending at this court, of which due notice  
 previously given, it was ordered by the court  
 should be given to the other nine, to appear  
 court on *Michaelmas* day then next, to shew  
 they should not be removed from their said  
 such non-attendance.

On the 20th, due notice was given, and  
 severally, and respectively, summoned to app

That *Wilder* only attending at the said  
 court, further time was given the other nine, u  
 court in *October*, 1755, of which notice was  
 to them respectively, and they were severally  
 but *Wilder* alone again attended. The court th  
 that the said others should be respectively an  
 their said offices. Immediately upon whic  
*Wilder* (retiring into the council-chamber) f  
 the vacancies, and (*inter alia*) nominated the  
*Richardson*, who, at the same great court,

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22-92, which I have heard cited in this court. 1 Lord Raym. 391. the case of *Coventry*. 2 Lord Raym. 1565, the case of *Doncaster*, Mich. 3 Geo. 2., and that case seems to hold *Bagg's* case to be good law.

Against these concurrent authorities there is only one dictum in the books, and that is in *Str.* 819, Mich. 2 Geo. 2., Lord Bruce's case, where it is said, "a corporation has, incidentally, a power of amotion, though *Bagg's* case seems contrary:" whereas that case does more than seem so, and is express. And, the next year, in the case in Lord Raym., the same judges resolved the contrary.

In the late case of *Rex v. Ponsonby*, an express power of amotion was stated in the charter. There *Ryder*, C. J. cited a passage from Sir Robert Sawyer's argument, but gave no opinion.

If a person neglects his office, he may be prosecuted for it; and if convicted on an indictment (as it concerns the execution of justice), then they may remove him, but they cannot try the fact.

It may be said, that, if the members are injured, they are not without their remedy: but may apply for a *mandamus*; and, if a false return is made, they may bring an action. But then they may be out of their office for several years before the matter is determined.

But, supposing there is such power of amotion; there ought to appear such a breach of duty as is against the party's duty to the corporation, and his oath of office: and this appears by *Bagg's* case. They should therefore have stated the oath taken by the amoved portmen; and in 2 Lord Raym., 1233, the oath of a recorder is set forth.



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and the body cannot assume any additional authority through necessity, &c.

That this is so, appears from what was the law before 11 Geo. 1. ch. 4.: where, if there was no election on the charter, or prescriptive, day, there was no remedy. So here, the charter could never intend to vest the whole power in a single person; if they permitted all the places of portmen but one to be vacant, I apprehend, the body could not be filled up: if that would be the case on the death of the portmen, *a fortiori*, it should be so on their removal by the act of the burgesses, &c.

Another objection occurs on this head. It does not appear, that the defendant was well sworn in: saying, that he was duly sworn, is not sufficient; but they should have set out the form of the oath, and before whom the swearing was, and not argumentatively only; for the power of administering oaths must be derived from the crown, and therefore the authority should be expressly set out. 1 Str. 539. In the case of *Rex v. Gibbon*, Mic. 8 Geo. 2., Lord Hardwicke said, "a defendant must shew a good election, and swearing, and not only shew a swearing, but a right of swearing."

Serjt. Poole, for the defendant.

This is not the case of a *mandamus*, and return, where the greatest precision is required, but it is a plea to an information for an usurpation, which is to be construed according to common intent: and that there was a vacancy, in fact, by the amotion of the other portmen, and an actual election of the defendant into that office, is sufficient to entitle him to a judgment on this demurrer, without entering into the merits of the case which he has

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this. There (in *Bagg's* case) the cause shewn for removing was insufficient, here it is, confessedly, otherwise. There it was for disfranchising a freeman; and so is the case in *Style*: this is only the removal of an officer for misbehaviour, and he still continues a freeman.

As to the case in Lord *Raym.* 391. it is too imperfectly stated to be of any service on either side.

2. Lord *Raym.* 1565, the question of the power of removal did not govern the resolution in that case, and the court there seemed to agree, that they remove the chamberlain for misbehaviour, though not disfranchise.

The case of my Lord *Bruce*, which Mr. *Gould* mentioned from *Str.*, I shall make some use of; and, if what I have observed on *Bagg's* case be right, it does not clash with that determination. The words removal, or resignation, in the charter, strongly infer a right in the corporation to amove for just cause, as the contempt, and abdication, in this case certainly is.

In the case of *Rex v. the Mayor of Newcastle*, which began in this court in *Hil.* 1744, and was adjudged in *Mich.* 21 *Geo.* 2., on a *mandamus* to restore Mr. *Fetherstonhaugh* to the office of an alderman, the return, that the select council had amoved him for twenty years absence from the corporation, was held insufficient, there being no custom, or grant, to warrant it, without which it cannot be good in a select part of the corporation, however it might be in the case of the corporation at large; and *Lee, C. J.* seemed to think, the corporation at large might amove (a), though he did not positively say so; and, in that case, the court refused a peremptory *mandamus*.

(a) *Rex v. Tidderley*, 1 *Sid.* 14.

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oath he took, and what was the custom, or he would not have maintained his plea, and all this would have been intended after a general verdict for the defendant: so it is well enough in the present case, where we are upon a general demurrer, whatever it might have been, had this been shewed for cause of demurrer.

*Reply.*

In this case the franchise of the people removed was a freehold, and how there can be a difference made between the case of this office, and a freeman, I cannot see

In the case in *Sty.* so much of the oath as was necessary is set forth.

Here was properly no contempt, as no particular notice, or actual summons, is alleged to have been given, to attend the duty of their office: they were summoned only to the *Michaelmas* court, and that not to perform the business of their office, but to shew cause why they should not be amoved, for non-attendance at former courts, to which they do not appear to have been ever summoned.

The term *residue* certainly meant to include more than one. The custom is, for the *residue*, or *major part* of them, to elect.

*Ulterius consilium.*

This term it was again argued by Mr. Serjt. *Hewitt*, for the prosecution, and Mr. *Norton*, for the defendant, as follows:

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functions; may sue and be sued, grant, purchase, or make by-laws, not repugnant to the common law.' As they have wants, so these, and all other, incidental powers necessary for the enjoyment of the privileges granted to them, whether granted expressly or not; the same as in every grant to a common person.

But that this is not such a necessary, incidental, power, I shall endeavour to shew; 1st, from general legal principles, 2dly, from authorities.

1. A member of a corporation has a freehold in his office for life. A freehold is of high esteem in law, and, by *Magna Charta*, no man can be disseised of it, *nisi per judicium parium suorum, aut per legem terræ*. It is a matter of too much consequence to pass as an incidental power; this is an office for life, and a freehold *publici juris*.

Two kinds of powers of amotion granted to corporations are mentioned in the books: 1st, *ad libitum*, 2d, for good cause.

In the first instance, the freeman takes but a conditional, qualified, freehold, *sub modo*, and subject to the power of amotion by the corporate body; but this power is not common.

The second is more applicable to the present case, it not being agreeable to legal principles, that any one should be removed from his freehold without lawful cause.

That most tender branch of the prerogative, the jurisdiction of cases criminal, shall not pass without express words.

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Though they were mentioned on the last argument, yet I must beg leave again to refer to *Bagg's* case, 11 Co. 93, and Sir *Robert Sawyer's* argument, in the famous case of the *quo warranto* against the city of *London*, fo. 22, and the same argument, *State Trials*, Vol. IV. p. 810, and it is observable, the words in *Bagg's* case are, "being convicted, and attainted."

The power of the crown to amove by mandatory writ, is taken notice of by Sir *Robert Sawyer*, and he refers to the case of a coroner, *F. N. B.* old edit. 163, new edit. 381, *Reg.* 177, 8. a bailiff of a wapentake: *F. N. B.* old edit. 164, new edit. 383, a verderor: *Dyer*, 333. Sir *Robert Sawyer* also mentions the case of a mayor of *Berwick*, whom such writ issued to remove. This inference is deducible from thence, that such writs should issue when offences arise; and shews, that such power remains in the crown, to come out as occasion requires.

(The court observed, that, in the case of coroners, there was conviction: and *Foster*, J. asked, whether any such power of amotion was exercised, or claimed, by the crown in modern times?)

I do not mean, that the crown can remove *ad libitum*, but only after a conviction, where the offence appears to be judicially determined. *Sty.* 477, 480. 2 *Salk.* 430, the power in a corporation to amove must be set out. In 2 Lord *Raym.* 1564, the authority of *Bagg's* case is recognized, and in that case of *Doncaster*, the return to the *mandamus* was quashed, and a peremptory *mandamus* granted.

Thus stood the old authorities unimpeached, until *Ponsonby's* case, which was mentioned on the last argu-

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In the case of *Rex v. Pomfret*, in Queen Ann's time, in this court, (mentioned in a book called *Lucas's Reports*,) the non-attendance of an alderman at the sessions, was held no cause of amotion, because the court might be held without him, and no special damage was alleged.

But supposing the corporation in general have an incidental power of amotion, and here was good cause, yet it is not well exercised here, being done by this particular court.

If it was an incidental power, it could be exercised only by the whole body corporately assembled, viz. the bailiffs, burgesses, and commonalty: here it was by the bailiffs, and a great number of the burgesses and commonalty, without mentioning any certain number, or even saying, that they were a majority. Their names should have been set out, that the other side might have an opportunity of traversing their being burgesses. This was a mixed assembly, and not a proper corporate assembly of the whole body. If the portmen are, as they seem to be, an essential, integral, part of the corporation, there should have been a majority of them, which there was not, seeing nine out of ten were absent.

In *Carth. 172*, the court of the lord mayor, and aldermen, of *London*, was held not to be a corporate assembly, but a court belonging to their constitution: the plea here only says, they were removed by the court.

Again: the removal is not set out to be under the common seal; only stated, that the court ordered them to be removed: this is not a matter of record, and therefore ought to be under the common seal, by which alone corporations can do acts *in pais*. 1 *Salk.* 192. *Plow.* 91.

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venient time: that could not be instantly; for if so, *Wilder* must have determined to remove the others, before their time for shewing cause was come; or else the choice was precipitate, and without due consideration.

It should also have been alleged, in the room of which one particular person amoved, *Richardson* was chosen: and not said in the room of one in general.

Mr. *Norton*, for the defendant.

The 1st question is of the greatest consequence to all corporations that have no express power, by their charter, or by prescription, to amove their members for just cause.

It has been said, that corporations have no power to amove except by one of those ways; and that, no such being set out here, none can be presumed. I admit the latter part of that position; but what we rely on is, that this corporation has an incidental power of amoving its offending members.

It is objected, first, that this is an amotion from a freehold; secondly, that there is no necessity for such a power.

Whether it is necessary for the enjoyment of the privileges granted by the charter, is a very narrow question. In common grants, if I grant a close, a right to a way, &c. is granted, though not named. If I grant a liberty to lay pipes, the grantee may come to repair them: a power to a corporation of amoving members is as necessary. It is admitted, they may amove after conviction, for heinous offences: this is limiting the power in a

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and thereby incapable of governing: suppose him deprived of sight, &c. Lord *Raym.* 1564.

The question is not here, whether these portmen ought to be disfranchised, and stripped of their freedom of burghesses, but only from this particular office. Here the whole argument has been built on a power to disfranchise; whereas they are cases very different; and the case I just now mentioned from Lord *Raym.* was determined on this distinction.

It has been urged, that there is no judicial determination, that corporations have this incidental power: but I submit it, that, in the case of Mr. *Fetherstonhaugh*, referred to by the Serjeant, it was admitted on all hands, that, if he had been removed from his office of alderman by the corporation at large, for good cause, it had been legal; but the right of amotion set up was in a particular part of the body corporate, and that the court held ill.

In Lord *Bruce's* case, the same was taken for granted, after consideration of *Bugg's* case.

In the case of *Rex v. Plimpton* (or *Clinton*, or *Clifton*), before Lord *Hardwicke*, the same doctrine was recognized.

The Serjeant has said, there is no occasion for this power, because they may be removed by a writ from the crown: but no precedents can be found of such writs having issued in times that this court would now copy after. It is a dangerous doctrine, and the practice would be now deemed anti-constitutional.

The precedents of coroners, and other common law officers, not members of corporations, are no way ap-



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Another objection taken is, that we have not stated a good cause for this amotion, as no special damage is alleged; and to prove this were cited 1 Inst. 233. 4 *Mod.* 34, and Lord *Raym.* 1233; but those books prove the contrary to what they were adduced to shew; for Lord *Coke*, in the place referred to, says, that non-user of a public office is a forfeiture. Here the contempt, and non-attendance, is the damage; and though others might attend, and do their duty, and so no special damage accrue, yet that will not vary the case. Suppose none had attended, none of the constituent parts of the assembly, there might have been an end of all the benefits under this charter. The corporation has a right to the attendance of all its members; and, on the other hand, they have all a right to be summoned; which proves, that all should attend. The special damage cannot be made out in any case, but where the attendance of that particular person is essential to the holding a court, as a mayor, or other head, or single, officer.

But these are all matters previous to the defendant's becoming a portman, and to which, consequently, he is a stranger; therefore it is unreasonable, he should answer for it in this kind of criminal proceeding. If the portmen were wrongfully removed, they should have applied for a *mandamus* to restore them; and then the question would have been agitated between the proper parties; and they should not have come in this oblique manner, which, I presume, they did, hoping to get their costs under the late act of parliament.

Here the defendant might have alleged generally, that there was a vacancy, and that he was duly elected: but, upon the plea as it now stands, the prosecutors, making use of the prerogative of the crown, might take issue on

each distinct fact in the plea, and put the defendant to maintain every part of it, or he would be liable to double costs: so that if the old portmen were well removed, but there was any fault in the defendant's election, or being sworn in, he must be saddled with costs, though the others have no right.

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The case of *Rex v. Pomonby* has its weight as to this objection.

As to the setting out the portman's oath, it is not at all necessary, as it is not alleged to have been the ground of their amotion, but it was their obstinacy, and breach of duty. But, if there was any thing in the objection, informalities of that kind, which would be cured by a verdict, cannot be taken advantage of on a general demurrer.

2. The second great question is, whether the defendant was duly elected? The court, I hope, will go as far as they can to support this election, as the very existence of the corporation depends upon it; for if *Wilder*, the only remaining portman, could not fill up the number, the corporation is dissolved. This was the ground for granting the *mandamus* to elect a mayor in the borough of *Cardmarthen*, though there was then a mayor *de facto*: the very being of the corporation (as the parties applying for the *mandamus* contended) depended on the single thread of one man's life.

The defendant here was elected by the residue, which word, *ex vi termini*, imports, what remains of the body.

In the case of the *Queen v. J. S.* a Burgess of *Devizes*, *H. 7 Ann.*, the election was to be by a majority of the

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body, which consisted of 36, yet that number being reduced, the court held a majority of the survivors sufficient,

The court has held, in parallel cases, such expressions as these to be merely directory.

As to the time of the election: they did right not to defer it, as there was only one life in being on which all depended.

On the last argument it was objected, that we have not set forth before whom the oath was taken.

That is false in fact,

It is objected, that the substance of the oath should be set out. I admit, the defendant must set out a full title against the crown. Here it is set out, that he was duly sworn, which is the usual manner, and, I apprehend, sufficient; because, had there been an issue joined, instead of a general demurrer, the defendant must have proved all this at the trial, and, if so, these objections are of no avail on a general demurrer.

Objection.—No neglect of duty appears.

Their contumacy, and non-attendance, is the offence, and whether their advice was wanted, or not, they never came to see. Though the advice was to be given to the bailiffs, yet it was for the benefit of the whole corporation.

Objection.—A motion bad, because not under the common seal.

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provided against by their charter; and the consequence must be, a dissolution.

What the defendant might have pleaded is not the question: here he has thought fit to bring the matter of the amotion of the old portmen before the court.

It is said, they neglected to attend, contrary to their oath; therefore, the oath should have been set out, that the court might judge on it.

The amotion could not be on record, as it is here made, for the court is not a court of record.

Lord *Mansfield*, C. J.

The first general question has been spoken to as fully as possible, and, therefore, no further argument, on that head, can be of any use. There is, however, one thing which occurs to me, that has not been mentioned, which I have formed no opinion on. And that is, the nature of the summons to the portmen, and of their contumacy, and neglect in attending upon such notice, that would amount to a forfeiture, supposing the power of amotion, and that non-attendance may, in some cases, be a good cause of amotion.

I do not find, that any case has come before the court of persons having been amoved for non-attendance at one or two courts only, where their attendance was not necessary to the carrying on the business of the corporation; and yet it may be material to settle the limits in that case, as many members may think it indifferent whether they attend on common occasions, or not, where nothing special is expected.

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1st Question. Whether the notice given of holding the great court, on the 8th of *September*, 1755, was sufficient for the portmen to incur a forfeiture of their office for contumacy?

2nd Question. Whether, after this absence, the notice given them to shew cause was sufficient?

Considering the nature of the constitution, there was no obligation on these portmen to attend the great court. It is to be held by bailiffs, and by the burgesses, and commonalty, or so many of them as *would* be present. There is no confined number, and no particular appearance is required, except of the bailiffs: only such of the burgesses, and commonalty, as *would* attend.

It is, I admit, stated, that the portmen ought, by their duty, to be present; but that allegation of the defendant, connected with what goes before, means only, that they should be so when the bailiffs give particular notice.

The general notice, by tolling a bell, sounding a horn, &c. might be due notice so as to authorize them to hold a court, and yet not reach the ears of every member. And, as this is a populous, and large, town, most probably, only such general summons was given. If personal summons was given, it should have been alleged, but without such personal summons, a man cannot be guilty of a crime, so as to lose his freehold.

2. There should have been personal notice to shew cause.

This court never censures any body till they have had

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murrer confesses that—If personal notice was necessary, it is implied in the word *due*.

Again, it is alleged, that they *wilfully, and voluntarily neglected to attend*; which, could not be, unless they had been summoned, and had the alternative before them. Neglect of the known duty of an office may be generally alleged *contra debitum officium*. 1 *Keb.* 597.

Further, they were all severally informed of their neglects, and of the order for them to shew cause, and yet none of them appeared. If they had not proper notice of the former court, they might have shewn that for cause to justify their non-appearance: but if a party summoned refuses to appear, all is to be presumed against him. They ought not to be allowed to avail themselves of this objection in this collateral manner: as on a *sci. fa.*, a man cannot plead in bar to it, any matter which he might have pleaded in bar of the action.

2. Without any personal notice, it was the indispensable duty of the portmen to attend the great courts, and advise, and assist, the bailiffs, and that though their presence was not essential to the holding a court. The judges of this court may sit without their officers, but yet an officer's non-attendance would amount to a forfeiture. *Dy.* 114. pl. 63. So a clerk of a market, and yet the market may be held without him. 9 *Co.* 50. So the recorder's non-attendance at a borough sessions, though the sessions may be held without him. Serjeant *Whitaker's* case, 2 Lord *Raym.* 1237. This office of portman is of, at least, as much consequence as the recorder's attendance at the borough sessions. They are of the council, and are, in person, to attend, to advise in matters relating to the government of the corporation, which is a matter of daily

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Here the custom is alleged to elect portmen out of the resident burgesses ; therefore, it must be intended, those portmen were then resident, and (as their duty requires) have continued so since : and, if it was their duty to have attended, no personal notice was necessary. Proclamations at the county courts are sufficient to warrant an outlawry, as every freeholder, &c. is supposed to be there. So in forfeitures on by-laws at leets. 2 *Ro. Ab.* 136. *Cro. Car.* 497.

The reason, therefore, why they had not notice, if in fact they had not, was itself a sufficient cause of amotion ; that is, their being absent from the place where the duty of their office obliged them to reside.

Their contempt, in not attending, after notice of the order to shew cause why they should not be amoved for former neglects, was also an abdication, and forfeiture, as they were bound to obey the orders of the society as long as they continued members of it ; and so their contempt amounted to a dissolution of the compact between them and the corporate body. It was a contumacious perseverance in their offence, and a denial of all subordination. An officer being demanded, and not appearing, is a forfeiture. *Bro. forfeit. de terres*, 61. 115. And it is said by *Holt*, in the case of the City of *London v. Vanacker*, *Carth.* 483, &c. that the corporation must of necessity have a coercive power over their own members.

### *Reply.*

Every neglect of non-attendance does not involve the crime of forfeiture, as appears by *Barnardiston's* case, and also by *Serjeant Whitaker's* case.

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It is clear, that the old portmen had no personal notice of any of the intermediate great courts, held prior to that where they were required to appear, and shew cause why they should not be removed; but of that court they appear to have had personal notice. Of the others only the general summons of blowing a horn, sounding a trumpet, or the like: and the words, that they *wilfully absented* themselves, urged by Mr. *Yates*, to amount to a charge that they were personally summoned, will not do; for whether wilful, or not, is a consequence of law to be deduced from facts, which must, therefore, be set out, and cannot be thus supplied.

1. The 1st objection is founded on the authority of the 2d resolution in *Bagg's* case, as reported in 11 Co. 99. But in *Rolle's* report of the same case there is no such resolution; the exception indeed is mentioned to have been taken, that there ought to be a precedent conviction (where the corporation have no special power of amotion by charter, or prescription), but nothing is said by the court as to that point, nor was it directly before them; as, in that case, the cause of amotion alleged was, on all hands, agreed to be insufficient. It was an amotion by a select body, and not the whole corporation, which certainly cannot be supported without shewing a special authority.

There are three heads of offences that are a foundation to discharge an officer of a corporation, or disfranchise a freeman. 1. Such as have no immediate relation to the corporation, but are of themselves of so infamous a nature as to render the party unfit for any public franchise. 2. Such as are merely against the duty of his oath as a corporator, or the duty tacitly annexed to his office. 3. Such as are



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doubt, it would not have been necessary to have done it in this case.

That, in the case of offences indictable, such as the 1st species before mentioned, a previous conviction is necessary, though the corporation have a power by charter, or prescription, to amove, was resolved by Lord *Hardwicke*, C. J. in the case of *Rex v. Sadler*, where he mentions the *Queen v. Lane*.

The 2d objection upon the 1st general head, viz. that here was not a sufficient cause of amotion, we are all of opinion, is well founded. No personal notice appears to have been given to the old portmen, that their attendance was required at any of the great courts mentioned in the plea, except the last, which was for them to shew cause why they should not be amoved for non-attendance at the former courts. Whereas, if such non-attendance did not amount to a sufficient cause of amotion, they had no occasion to appear, or shew any cause against it.

It does not appear, their attendance was necessary to the holding the court, but as many as *would* attend were to advise, &c.

It is not necessary, in determining this case, to say, what wilful contempts, and repeated refusals to attend on personal summons, would amount to a forfeiture. In the *King v. Mayor of Carlisle*, *Str.* 385. the alderman was actually summoned to attend the court of common council, yet, not being particularly summoned to the court of mayor, and aldermen, it was held insufficient. And if the general signal of holding a court was sufficient to ground a forfeiture for non-attendance, there is no knowing how far it would go. Certainly every member of a cor-

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I apprehend, the legislature never meant to use that word in the strict, and particular manner which the other side must contend for, but in such a general, common signification of the word as might be understood by every plain, illiterate, freeholder in the kingdom; for men's properties are not to be suffered to hang upon cobweb, metaphysical, reasoning, nor are words used by the legislature on such occasions, to be tortured into a meaning which nothing but the greatest degree of critical nicety can construe them to signify.

There are infinite degrees of credibility, from any thing below demonstration, quite down to impossibility. There are some *omni suspicione majores*: others whose characters are not so universally free from exception, yet worthy of credit; and, certainly, the legislature did not mean to confine it to the former only.

I think, verily, the legislature meant to refer the credit to that period of time only when the witness gave his evidence, and not to the time of the attestation, when there was nobody to credit, or discredit, him but his own heart; and I defy the subtilty of the gentlemen on the other side, to produce a case where the question touching competency has not been always referred to the time of examination.

But, to consider it also at the time of attestation.

The competency of a witness is to be tried by this question, whether he will *certainly* gain, or lose, by the case going one particular way? and, therefore, if it be but a possibility, or even a probability, he remains competent. As for instance:

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pated, he shall, notwithstanding that, be a competent witness to establish the will.

Now here it is not found, that any of the witnesses knew of this clause in the will; and the court can intend nothing on a special verdict; and if they did not, they were under no bias.

At the examination, they had none of them any interest in establishing the will.

The case of *Anstey (a)*, and *Dowsing*, relates not to the present question: there the witness continued a creditor to the time of his being examined; and whether the court did, in that case, determine, that the point of time from which to judge of the witness's credit is the attestation, I cannot say, though I was of counsel in that case: but I am sure, they had no need to have determined it, as it was not the point of that case, where not only the witness was a creditor at the time of examination, but the will was a strange wild affair, executed by one who had been drinking at a tavern all night.

Upon the whole then,

1. The word *credible* in the act, means no more than competent.
2. It never meant to confine it to persons *omni suspicione majores*.
3. In this case, all the witnesses were, in every sense,

(a) *Str.* 1253. 1 *Bl.* 8. S. C.

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*death*, to pay all his debts: but he might have none at all when the will was attested, which is the period of competency.

Lord *Mansfield*, C. J. asked, whether the word *credible* appeared to be a technical, legal, word, known in our law to have a precise signification (as the word *competent* has) previous to the statute of frauds; and whether a case could exist before that statute, where the competency was not always to be judged of at the time of examination?

*Foster*, J. said, doubtless, the word occurred in our statutes before that time, but that it had since become more frequent, especially in the game laws, and was always understood to exclude the testimony of persons interested in the event.

This case, in this term, came on again, when it was argued by Mr. Serjt. *Prime*, for the plaintiffs, and Mr. *Norton*, for the defendants.

Serjt. *Prime*.

The only question is, whether there were three credible witnesses who subscribed to the execution of this will? And there is no other objection to their credit, and capacity, than their being interested in the event.

1. I shall consider, whether the facts found warrant this supposition—first, with respect to *Squire*, and *Baxter*; secondly, with respect to *Higden*?

2. Supposing there was once a foundation for the objection, as to all, or any of them, whether, they being disinterested at their examination, their evidence ought not to be received?

There is no difference between the witness's being credible, and the man's being so; neither is there any difference between the credit of a witness at any other trial of a right, and that of proving a will: the rule is the same at common law, and on the statute.

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1. Where there is any difference in the circumstances of *H.* and the other two witnesses, I shall separate them, but this is common to them all; they are none of them legatees, nor entitled to any thing under the will as of the testator's bounty: they, like other just creditors, were entitled to a satisfaction, whether he made a will, or not. They claim nothing more; the will gives them no speedier remedy for the payment of their debts; nothing by way of interest: so that what he directs is not matter of choice, or favour, but strict justice; it is plain, they had an antecedent right prior to the will, for if they had not, that gives them none.

This reasonable distinction between legatees and creditors, was adopted by the legislature in the late statute, where the devise, or bequest, to a subscribing witness is made void; but the witness being a creditor only, his debt is saved, and, at the same time, his testimony allowed after he is paid. The first being merely voluntary, is understood to be revoked by the testator afterwards calling on the party to be a witness to his will, on that well known principle of law, that where two matters repugnant, and inconsistent with each other, occur in the same will, the last annuls, and revokes, the former. *Plow.* 541. 1 Inst. 112. Now the statute of frauds considered no part of the will more material than the due attestation: it is essential to the will, and therefore the calling a legatee to be a witness, is a revocation of the former bequest to him.

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But the creditor's situation is very different: he has a right to be paid in all events: and, therefore, the late statute saves his demands.

However, this being a case out of that act, it is argued, that the being a creditor incapacitates the witness. I admit the assertion *sub modo*; that is, where the will subjects the real estate to the payment of simple contract debts, and there is no other sufficient fund to pay them, because there it is beneficial: but it is otherwise, where there is another sufficient fund, because there the clause is useless, and *nihil operatur*. The old fund was here the most eligible, speedy, and proper remedy. And as to the objection, that the testator might live to squander away all his personal estate, or that the executor might waste it all, and become insolvent; that is a bare possibility, too unlikely, and remote, for the court to suppose, for the sake merely of overturning the will.

As to *Squire*, and *Baxter*, it is hard to say, that they were creditors at the making of the will, they having a higher, and better, security for their demands, than Mr. C.'s personal contract, by the provision of the act of parliament; and though their demands were originally on Mr. C., yet the act of parliament has, in consideration of law, discharged him.

As if a party is indebted by simple contract, and afterwards makes a higher security, as by bond, or mortgage, the simple contract is destroyed, and all actions on it gone.

The parties themselves here considered it in that light, for no demand was made on the executor, but the money

was paid by the trustees named in the act of parliament: therefore, in point of fact, the objection to them is gone.

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As to Mr. *Higden*: I agree, he was, beyond controversy, a creditor by simple contract. But, considering the modern way of executing wills, which are seldom, or never, read over in the presence of the witnesses, the objection is a little strained. It is hard, it should affect a witness's credit, when he knows nothing of the contents; and it does not appear, that *Higden* knew any thing of them in this case, but the calling him to be a witness, might rather induce him to believe, he was no way interested therein.

But let us examine, what real benefit, or advantage, even *Higden* could reap by this will.

The jury find a personal estate, more than twice the amount of all such debts as were not a direct charge upon his real estate; and it is not found, that the creditors by mortgages, had bonds, or other personal securities, to entitle them to call on the executor for a satisfaction out of the personalty: but admitting they had, and should exhaust the personal estate, yet the simple contract creditors might resort to equity, to marshal the assets. So, in this case, they must have recourse, first, to the personal fund, and, if that should prove deficient, then come into equity, in the same manner as they might have done, on the specialty creditors' exhausting the assets, though there had been no such clause in the will. The expense, and delay, would be the same: therefore, it is indifferent to *H.*, whether the will stands, or not.

2. Though the witnesses might, possibly, at some time, have a remote interest, yet, at the time of their examina-

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tion, their demands were all satisfied, and extinguished, both as to the real, and personal, estate; and they, thereupon, became admissible, and recapacitated, and proper to be heard in a court of law. Here, the objection goes not barely to their credit, but their admissibility; for, if their evidence is admitted, the jury, by finding a verdict principally on their evidence, shew their opinion of their credit.

In every other instance, the time of examination is the period to judge of the witnesses' credit; and having been formerly interested, was never an objection, if, by release, or otherwise, the right was extinguished, when the party was examined. I admit, the minuteness of the demand makes no difference, whilst it subsists.

In questions about rights of common, and parochial rights, the evidence of commoners, and parishioners, is rejected: but, if the commoner has released his right, or the parishioner removed to any place, their having been formerly interested, is no objection.

The case is the same, with regard to freemen of corporations: and so, as to the insurer, and insured, having released. In the case of the creditor of the bankrupt, if he has released, he may give evidence as to a discovery: so may the bankrupt himself, if he has released to his assignees all right to the surplus, and to any allowance under the statute. Many more cases of the same nature might be put.

I should be glad to know, what is the distinction, in a trial between party and party, between a question upon the validity of a will, and any other matter in dispute, that, in the one case, a witness shall be heard, and, in the other,



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allow it to be law. 1 *Sid.* 315. *Stevens v. Gerrard.*  
 2 *Keb.* 128. S. C. 1 Lord *Raym.* 730. *Viner's Evid.* 14.  
 No. 53. *Per Powis, J., at Brentwood assizes, 1720.*  
 If the party is actually paid his claim, then, whatever  
 becomes of the will, he cannot be called upon to refund.  
 So, if he releases, it is an effectual bar, and he has no  
 remedy, though the will be established.

A witness to a will is to be tried by the same rule as  
 in other cases, *viz.* whether interested in the event of the  
 suit, or not; whether he shall gain, or lose, thereby: this  
 none of the witnesses in this case would do; therefore, I  
 hold, the will shall be established.

Mr. Norton, for the defendants.

In the way in which I have considered this case, I shall  
 meet with the Serjeant's 2d head of argument first.

1. I hope to shew, that the true period when the wit-  
 nesses' competency is to be considered, is the time of  
 their attestation, and not of their examination.

2. That all the witnesses were interested, and, con-  
 sequently, incapable at that time; and that *Squire*, and  
*Baxter*, continued so, even to the time of their examina-  
 tion.

The statute was, as appears by the preamble, made, to  
 prevent fraud upon testators, and perjury, and suborna-  
 tion of perjury, the consequences, and attendants, upon it.  
 To effect this, the period of competency must be, the time  
 of attesting the will; and the contrary construction would  
 open the door, and inlet, to fraud still wider than before:  
 for then, let a testator be ever so cautious in selecting

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that is not so: they were creditors when they attested; creditors, when the testator died; and they even remained so at the time of their examination, and therefore then testified *in propria causa*. If I employ a person to do business for another, I am liable: the creation of another fund to discharge his demands, does not take away his relief against me, till he is actually satisfied. Suppose the title to the estate directed to be sold, had been defective, or it had not been sold, should they have been paid by nobody? In an action against the testator, he could not have pleaded the provision of the act, unless the demand was actually paid: here part of the demand yet remains due; and, though that was owing to a miscalculation, it remains a debt, and recoverable against the executor; what the trustees have paid being no merger, but only a satisfaction *pro tanto*.

*Higden* was a creditor at the attestation, as the Serjeant admits, beyond all controversy.

The witnesses' interest under this will has been called a remote possibility, or rather no interest at all; because the verdict finds, that the testator left personal estate sufficient to pay all his debts by bond, or simple contract: but it does not from thence follow by necessary consequence, that, therefore, at all events, he left enough to pay all his debts that affected his personal estate (and the court can intend nothing upon a special verdict), for he might owe money on recognizances, judgments, or covenants, which might exhaust the personal fund: and as to marshalling assets, that belongs to a court of equity, which the courts of common law cannot take notice of.

The question then is, if a man, owing debts by simple contract, to the payment of which his lands, by law, are

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common law, seeing the heir was to sit in the seat of his ancestor, and therefore ought to have the same means of support: this statute was therefore looked upon in a very strict light by the common law judges. Though it made so great an innovation, yet was it so very loosely penned, that the single requisite it prescribed was the being in writing: that was an inlet to continual frauds on testators *in extremis*: loose memorandums, instructions to an attorney, nay, bare letters, were set up, and established, as wills: which the judges could not prevent, seeing the single requisite of their being in writing was complied with.

To remedy these inconveniences the statute of frauds was wisely ordained, and may now be considered as ingrafted on, and a part of the statute of wills. The requisites it enjoins are essential, and in the nature of conditions precedent: none of them have ever been dispensed with, and, perhaps, it had been better for the subject, if the act had required still further solemnities: it was designed to stop all avenues, and approaches, to fraud; it requires not only a bare competency in the witnesses, but, that they be persons *omni exceptione majores*. The remotest possibility, or expectation, may bias, and influence, their testimony: they are not so good a guard on the testator, nor so likely to detect a fraud: to require this entire disinterestedness, could be attended with no inconveniences, as proper persons might easily be found. The able framers of this act well knew the import of words, they meant something more than competent, for that would have been involved in the term, witness. If the legislature had only meant competent, they would have used that word.

This word *credible* occurs in an act previous to this, in the statute made against hunting of deer, in the 13th year of the same reign; and that is the only place where I

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Having gone thus far, I shall just mention a couple of cases which are strongly in point.

*Hilliard v. Jennings*, Lord Raym. 505. Com., 90. 94. Carth. 514. The devisee being a witness, the will was held void.

*Anstey v. Dowsing*, 19 Geo. 2., in this court; though this was not the point directly determined in that case, yet *Lee*, C. J., declared, in delivering his opinion, that the time of attestation was the time when the credibility of the witness was to be considered. And though it was strongly urged, that such a determination would shake half the titles in the kingdom, yet was not the court shaken in their opinion of the law. Here, there can be no argument from inconvenience, since the late act of parliament.

If any argument might be drawn from the statute of 25 Geo. 2., it would be in our favour, as, otherwise, there was no occasion for that law.

Serjeant *Prime's* reply.

All our books say, that the will of an owner should have its effect: and if Mr. N. means, that the statute of wills was against the good of the commonwealth, he contradicts what every one of our books lays down. The cases, too, which Mr. N. puts on the statute of wills, prove, contrary to his assertion, that that statute has been favourably construed; otherwise, why were letters, &c. admitted as wills?

The statute of frauds also has been construed liberally: signing has been held satisfied by sealing; a possibility of seeing the witnesses attest, has been held sufficient.

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The clause in 4 & 5 *Ann.*, was merely to correct that absurdity amongst the civilians of rejecting the evidence of children, which they borrowed from the *Roman* law in the case of solemn testaments, which was a sale from one family to another, and was therefore called a mancipation of families, for which reason none of the family could be witnesses; but that kind of will was never introduced into this country, nor any but their, less solemn, military, testaments. The civilians had therefore adopted the practice without the reason of the thing; and as courts of delegates, consisting of common law judges, and civilians, proceeded by different rules of evidence, this act was made, to render their proceedings uniform.

On the day sevensnight after this argument, *viz.* on *Friday, 25th of November*, judgment was given by Lord *Mansfield, C. J.*, to the following effect:

Lord *Mansfield, C. J.*

This matter of *Wyndham, & Chetwynd*, which now stands for judgment, comes before the court upon a special verdict; the particulars have been very minutely stated already, I shall only mention those points on which it turns,

The special verdict, after setting out the will, which is not material here, states, that there are three subscribing witnesses to it, *viz. Stafford Squire, Robert Baxter, and Josiah Higden.*

By the will it appears, that the lands of the devisor are charged with the payment of his debts; that is, they are chargeable as an auxiliary fund, in case the personal estate proves deficient; and it is never otherwise, unless the personal estate is expressly exempted.

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inserted as a word of course, and is misapplied. Had the operation of the word been attended to, it never would have been inserted here; because many things may be required to comply with it: in some cases it would have a meaning, and, in others, no meaning at all.

Suppose it signifies *competent*, it is implied by the term witness: no man can be a witness that is not so.

This whole clause, which introduces a positive solemnity, to be observed, not by the learned only, but the unlearned, at a time when they are supposed to be without advice, in a matter which greatly concerns every proprietor of lands, where the direction should be plain to the meanest capacity, is yet so loose, that there is not a single branch of the solemnity that is prescribed with sufficient certainty to convey the same idea to the greatest capacities. The whole is uncertain in every part of the form required: as to what is to be deemed a signing by the testator—whether the witnesses are to attest at the same time—whether they are to see the testator sign it: whether they ought to know, that he signs it as his will: whether he ought to publish it as his will.

Very little precision might have prevented all this: therefore, one may easily believe, that this epithet slipped in as of course, without attending to the impropriety of using it on this occasion.

I have already said what occurred to me with regard to the penning of this act by the Lord C. J. *Hale*. He was dead, before it came into the house. There might be loose heads, with regard to the general view of it, which would require to be settled, and digested.

But in what sense soever this is taken; whether this

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relative to the capacity of the subscribing witnesses, since the statute.

2. Upon the foot of the judicial determinations that have been since the statute.

3. And in the 3d, and last, place, the particular case now in judgment, under all its circumstances.

1. I shall first consider the matter at large.

Let me observe, that the power of devising ought to be favoured : it is a natural consequence of property, and of the right a man has over his own. It was a right, by the law of this country, before the conquest, and subsisted down to about the reign of *Hen. 2.* It ceased then, consequentially only, by the introduction of the feudal tenures ; because every alienation was contrary to that, except *inter vivos*.

Then private devises were introduced.

The statute of uses checked that form of devising, and therefore the statute of wills was made.

Then followed the statute of frauds, which did not mean, at all, to restrain testamentary dispositions of lands, because the reasons for encouraging that power, were, at the time that statute was made, greatly increased. The policy of tenures, from whence arose the impediment to wills, was abolished ; and many consequences followed, which made testamentary dispositions more reasonable than they had been in *Greece*, or *Rome*, or in this country before the conquest. The eldest son was the only heir ; and, even among collaterals, there was only one heir, in exclusion of



all the rest; simple contract-creditors had no right to be paid their debts, out of the lands in the hands of the heir; nor could they be traced by other creditors. Trusts were created, of which the widow could not recover dower.

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In case of personal estates, the succession of the testator's estate is subject to all debts, and governed by natural rules flowing from equity. In real estates, it is governed by the political consequences of a positive system; which makes a testamentary power necessary, to do justice to creditors, and other claimants.

The legislature meant only to guard against fraud, by this solemn attestation, which, they thought, would be soon known, and soon complied with.

In theory, this attestation might be a strong guard; it might be the same in practice; but, I am persuaded, many more fair wills have been overturned for want of form, than fraudulent wills prevented by this guard. I have had a good deal of experience at the Delegates myself, and hardly ever met with a forged, or fraudulent, will, where it was not regularly attested, with all its due forms; and I have heard many eminent civilians, some of whom are dead, and some living, make the same observation.

Supposing the subscribing witnesses to be honest men, how little need they know of the transaction. They need not know the contents of the will: nor be together when they sign; nor know it to be a will; if the testator delivers it as a deed, it is sufficient.

For these reasons, judges should lean against objections to the informality. They have always done so in every

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construction that has been yet made: on other parts of the will, it has been different; but, in every construction, they have been always against the objection to the formality, *a fortiori* here.

They would be still more so, if the formality should introduce a snare, in which many honest wills would be overturned, and be no preservative against fraud.

At the time of making this act, the law rejected no witness, unless, at the time of his examination, his testimony tended to support his own title; and he thereby enabled himself to hold, or recover, an interest under it.

In ecclesiastical courts, the probate is conclusive to every body as to all the personalty. If a legatee comes there to have a probate, he virtually entitles himself to his legacy. If the legatee was a witness, he was easily rendered competent: if he had been offered his legacy, the very tender made him a witness.

In cases at common law, where a witness had a charge upon land that was devised to another, or, in case of a personal legacy, if the interest would never take effect: if he released only, in these cases, he was allowed to be a witness: the nice objection of a remote interest which could not be paid, or released, though held an objection in another case, was not allowed to disqualify a witness to a will.

As in the case of 2 *Sid.* 139, where there was a devise of a charity to a parish, to be paid out of land, a parishioner was allowed to be a good witness.

As, before the statute, no man could entitle himself by

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Where is the reason to say, that a witness, who does not know the will, who takes no interest by it, was biassed at the time of subscribing, or can be so at the time of his examination? During the lifetime of the testator, all these things are bare possibilities, he can then have no interest.

That objection is also answered by the fact of his swearing when he is totally disinterested. His purpose is answered: the possibility of his being biassed, and the corrupt cause of his subscribing, is over. He now proves it for the sake of a third person. It seems wise, and just, to allow the objection thus to be purged, otherwise many settlements by will would be overturned. This overturning the disposition of great estates, would be attended with many family inconveniences: that is, the land would go to one part of the family, and the personal estate to another part: the will would be void as to the land, and good as to the personal estate. It is said, that this is intended to guard against fraud. It is no fraud, even in theory, in the case of a legatee; because he may get it in another shape: and I will shew you, how they may attest the devise which charges the land with their own legacy. If the land is once charged with the payment of the legacy to *J. S.*, by a regular, solemn, devise, the legacy may be afterwards revoked by a subsequent will, unattested, as to *J. S.*, and given to one of the witnesses to the will; and then he attested that will by which the land was charged, and, in that oblique way, gets the legacy by the subsequent codicil unattested, though he was a witness to the will that created the charge.

So there can be no objection, but in the form of subscribing. Let the will be ever so solemn, it must be said,

that to set it aside for a slip in the form, would certainly be a mischievous thing; to adhere to the form, and not to the substance.

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It is true, that, if the will be fraudulent, it may be set aside as fraudulent, though it is allowed to be formal.

Neither reason, nor policy, requires this objection to the formality to be carried further than I have allowed it, to be by the statute; that is, that a man should not be a witness *in propria causa*.

2d. But if the received determinations of courts of justice, acquiesced under for a series of time, and become the rules of law, have extended the incapacity further, they must be adhered to; which brings me to the 2d point.

And they seem to me all to agree, exactly, with these principles, without a single one to contradict, or interfere with them.

In many instances, the presumption of bias at the time of subscribing has been allowed to be taken off by a release. The authorities cited to shew this, are well settled. The case cited from *Viner*, as determined by *Powys, J.*

I know there was a case, on which a great estate depended, where objections were offered to the witnesses as persons interested; but the parties thought it not worth litigating, upon a presumption, that the objection might be taken off by release. This was before the case of *Anstey v. Dowling*.

Mr. *Fazakerley*, and Sir *Thomas Bootle*, have both told

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me, that they took it to be a settled point: and the number of wills that have been established where this objection lay, and never was taken, amount to a demonstration of it.

None of the authorities carry it further than this:— That a person cannot entitle himself, by virtue of his subscribing, as a witness, who, at the time of his subscribing, could not be examined as a witness.

*Hilliard v. Jennings. Anstey v. Dowsing.* The defendant, in the latter case, was a devisee, subject to an annuity of £20 *per annum*, to *Elizabeth*, the wife of *John Hales*, who was a subscribing witness, for life, for her separate use. There did not appear to be any personal estate. Then there was a charge, in the nature of a legacy, to be paid by the defendant out of the estate devised to him. The annuity being for her separate use, it naturally was a trust, and the defendant was a trustee for the wife. Upon the validity of the devise to the defendant, her legacy depended: if the one only was to fail, the other dropt of course. The defendant must take it subject to the charge, and the trust: and upon a determination of the devise being good at law, equity would have decreed an execution of the trust; so that she was the *cestui que trust*, and her husband the witness to the will. In matter of evidence, the husband, and wife, are considered as one person, and cannot be witnesses for one another. The wife, in no case, can be a witness for the husband. The husband cannot be a witness for the wife, in case of a separate estate. The validity of the will depended upon his testimony;—the value of the annuity depended upon its continuance;—the time was uncertain;—the annuity was to be during her life; and there was no attempt to pay her, so as to obtain a release.

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will was only void as to the legacy: and *Carthew*, who was counsel in the cause, says, that the will was void *quoad* the devise of the lands to the plaintiff. The record has been searched, to see if the land was devised to any body else. (It is proper, for the sake of the public, to see upon what foundation that distinction went, if there was any such taken,) but it does not appear there.

Lord Raym., in 1 *P. Williams*, 557, *Baugh v. Holloway*, expressly says, that Lord C. J. *Holt* laid it down as a distinction. I have looked into the register's book to see for the proceedings in *Baugh's* case. The question was, whether the will was good as to the rest of the devisees, though it was void as to him? Mr. *P. Williams* mentions the argument of Lord *Raymond*, and that the court made the plaintiff pay costs, and gave him an opportunity to try the cause in a twelvemonth, if he thought fit.

I have endeavoured to see, what became of *Baugh's* case. In the pleadings, the objection to the will is not stated: that must be taken from the report of the case, and the state of the facts. It was a devise to *A.*, and his heirs, and if he died under 21, and unmarried, then to *Elizabeth*, the wife of the testator, in fee, subject to debts, and legacies. *A.* was a subscribing witness to the will. Testator dies; *A.* dies under 21, and unmarried; the wife, being possessed, devises to *C.*, and her heirs, charged with debts. *C.* devises in like manner to *D.*; and after these three devises over, each charging it with the payment of their debts, the heir at law of the first devisor brought his bill against *D.* to try the validity of the first will, and though nothing further appears on the record, yet it may be collected from the circumstances, that the heir did not proceed with his bill, but gave up the point.



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by the fund liable for that purpose being sufficient without the land.

The presumption was taken off before the trial, by the debts having been paid. But the benefit to be had under the will was, at the time of subscribing, really nothing; for it does not appear, that the principal fund then, or afterwards, was deficient. The charge is a bare possibility upon a contingency. In case the principal fund is insufficient, then I charge the land with the payment of my debts: which contingency never happened, to wit, the deficiency 'of the principal fund.

But I will go further.—I think a charge to pay debts ought not to incapacitate a subscribing witness from proving the will, though he wanted, or sought, a benefit under it.

Every honest man should make that charge in his will.

He who omits it is said to sin in his grave.

Fraud cannot be presumed by inserting a clause which, in equity, he ought to put in. No man would resort to a fraudulent practice to get his debt charged upon lands after the debtor's death: if he found his debt bad, he would resort to law, in the debtor's lifetime.

The public inconvenience would be great, if these clauses were not inserted.

Another thing is, that, it most commonly happens, the witnesses to wills are in some degree creditors. Servants for their wages: the parson of the parish is often a witness; he is a creditor for part of his tithes. The at-

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of the Consistory court, for the diocese of *Lichfield*, and *Coventry*; and also, that the administration might be redelivered to the husband; and grounded his application on a case in 1 *Mod.* 211. *Eq. Ca. Abr.* 296: to shew, that this could operate only as an execution of a power, and not as a will; and that the spiritual court had no jurisdiction, but in matters testamentary. That, as to her choses in action, or effects in *autre droit* as executrix, she might make a will, with the husband's consent, because the husband would have no right to them, without taking out administration: but her earnings are part of the husband's estate.

*Per curiam.* We can order nothing about redelivering the administration: you must take the common rule *nisi* for a prohibition.

Lord *Mansfield*, C. J. desired Mr. *M*—— to consider what use the rule he had obtained would be of to him, seeing the doctrine in the case in 1 *Mod.* is now exploded, as to that point; and the act of the wife, by way of will, though pursuant to a power, is held wholly testamentary, and necessary to be proved. This was my Lord *Carlisle's* case, on Lord *Sunderland's* will; and the death of the devisee, in the wife's lifetime, makes the devise lapsed.

This rule was afterwards made absolute, without any cause being shewed. And note, Mr. *Maddocks* told me, upon looking into the cases, he thought the prohibition ought to go, for that there is a difference, where the wife has power to dispose of every thing that she has, and where only of some particular part, as here.

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whatever exemption the bishop claims, is nothing to them.

Rule *nisi* for a *mandamus*.

The KING *agt.* - WAKEFIELD, ROBINSON, and  
GOUGH.—K. B.

An order of justices brought up by *certiorari*, on the foot of the title to tithes coming into question, within the intent of 1 *Geo.* 1. c. 6., is returned, and the writ superseded; on it being shewn, that the parties objecting to pay, were quakers, refusing merely from their scruples.  
1 *Burr.* 485.  
S. C.

Two justices made an order upon the defendants, who are quakers, for payment of small sums, being customary payments, due to the curate of *Burneside*, in *Westmorland*, and 9s. for costs, under 1 *Geo.* 1. c. 6. §. 2.

On appeal to the sessions, this order was affirmed.

The defendants, on the common affidavit, that the title came in question, moved for a *certiorari*: and, the orders being brought up, a rule *nisi* was obtained for quashing them.

Mr. *Norton* now shewed cause against that rule.

When this was obtained, a great while ago, several objections were taken to these orders, which I shall mention, and endeavour shortly to answer.

1st. Order bad, because made on several persons for distinct matters. The act of parliament does not forbid the joining of several. This is an easier, and less expensive, proceeding, than if separated.

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in cases where the title is in question, the justices have no jurisdiction.

To 4th objection. The justices might not be interested in the sums of money to be paid, but yet might be patrons.

To 1st objection. The parson could not have sued them in a joint action. This objection is warranted by *Str.* 471., and the case at bar is even stronger than that: one of them might have a right to a *certiorari*, when the other had not.

To 5th objection. The justices say there is so much due, *being the value of their ancient customary payments*. The payments might be due in corn. They might be for several years. *Robinson* is only ordered to pay 1s. 6d., *due to the curate*. It might be for money lent.

The act of parliament would be nugatory in giving a *certiorari*, if the court could not inquire into the title, when it comes up. The justices, according to that doctrine, need only send up an order good on the face of it, and all will be well.

Mr. Clayton, on the same side.

2 *Ro. Abr.* 81. pl. 6. Two persons cannot be indicted together for severally exercising a trade. Though two persons join in the same affidavit, they cannot be indicted together for perjury.

Lord Mansfield, C. J.

The justices are not to determine, in cases where the title is in question *sub modo*. 7 & 8 *W.* 3.

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From the preamble it appears, that these acts were designed for the benefit of quakers, to force them to pay without costs, that which, from a real, or pretended, scruple of conscience, they would not pay willingly, but might be obliged to pay, after having first been put to a very great expense. But the legislature never meant, that where there was any other reason besides scruple, or obstinacy, the justices should determine, that is, where there was a question of right.

The act meant, if the title is not in question, no matter what the form of the justices' proceedings is, no court shall look into it.

The quakers applied for this *certiorari*, and it was opposed: but the court thought fit to award it; and so it came on, upon exception taken to the proceedings, and one material point was insisted on: the quakers contending, that the title came in question, and, therefore, the justices had no jurisdiction. The other side insisted, that no such thing appeared on either the justices' or sessions' order, and that, therefore, this court had no jurisdiction. This part of the case depends upon the facts; for if the title actually came in question, and it was not the mere obstinacy of the quakers, as quakers, but such a doubtful matter as a member of the church of *England*, might controvert, then the justices had no jurisdiction.

I have seen the affidavits on which the *certiorari* issued, and desire they may be read.

The affidavits, on which the writ was moved for, stated:

"That the defendants controverted the title of

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There is another circumstance which shews, that the title was not in question, and it is an evidence from the quakers themselves. They have affirmed the jurisdiction of the justices, by applying to the sessions by appeal; if the title was in question, the sessions had no more to do than the justices.

The only objection then is as to the form of process now, as the writ is brought up, and the return filed; we have now no doubt at all upon that, as we are warranted by many precedents to supersede the writ, *quia implebitur*, and take the return from off the file. It has been done, where orders have been removed here, and the parties had an appeal to the sessions, and the time for appealing not then expired. It has been done on a special verdict at *Hicks's Hall*, removed hither, where judgment to be given was arbitrary, and not directed by any act of parliament; there it was sent back to the sessions below to give the judgment, because they were acquainted with the merits.

I am very glad we may do this, as it appears, from the affidavits, that the title was not in question; if it were, it should shew it.

Therefore, let the writ be superseded, and the return taken off the file; and let the case be sent back to the sessions.

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## CASE of the BOROUGH of St. IVES;

Or,

The KING *agt.* STEPHENS.—K. B.

Mich. T.

31 Geo. 2.

MR. S. Cox moved for an information in the nature of a *quo warranto*, against Mr. S. for exercising the office of alderman of *St. Ives*.

A *quo warranto* information will not be conceded, by which the validity of appointments in a corporation, long acquiesced under, would be disputed. 1 Burr. 433. S. C.

By the charter, aldermen are to be elected out of the capital burgesses, and mayors out of the aldermen; and the mayor must be present at the election of a new mayor. In 1728 a person was chosen mayor who had not been a capital burgess, and by that the chain of succession was broke.

*Denison, J.*

Though there is no statute of limitations as to matters of this kind in the statute book; yet I have known cases where the court have, in their discretion, refused applications of this sort, which tend to dissolve a corporation, after an acquiescence of 20 years. In the case of the borough of *Leominster*, wherein I was of counsel, the same was done.

*Foster, J.*

The court refused to do it in the case of *Malsbury*.

Lord Mansfield, C. J.

It would be of dangerous consequence. But the court will fix no precise time, no more than they have where a bond shall be presumed to be paid. Lord Raymond left

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that to the jury, after a silence of 18 years, in a case which I have a note of.

*Wilmot, J.*

It is dangerous *quieta movere*.

Motion refused.

The KING agt. THOMAS BOOTH.—K. B.

On a charge of rape, the accused held to bail, by himself, and three sureties.

THE defendant being brought up by *habeas corpus*, the return made by the gaoler was, that he was in custody for a rape.

Several affidavits were laid before the court, to induce them to believe, that the prosecutrix was a girl of very bad character, and the prosecution only commenced to extort money.

Whereupon, the defendant was admitted to bail, himself in £500, and three bail (though four is the usual number in felony) in £200, each, for his appearance at the next sessions at the *Old Bailey*.



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2d. Whether the carrying him to the judge's chambers, &c. was an escape, so as to make him a bankrupt within that statute?

As to the first question.—It is, I believe, a new case; and must, therefore, be determined on a sound construction of the statute.

In order to get at that, let us inquire, what the legislature designed by making that law?

Their intention clearly was, that the effects of a bankrupt should be equally distributed among all his creditors.

This statute directs, that the bankrupt-laws shall be construed in favour of creditors; that means, in such a manner that he may be forced to do justice to all, whether he will or no.

An incapacity to pay his debts, runs through all the descriptions of a bankrupt, or something that is strong evidence of his being in such a situation; as, leaving the kingdom, taking sanctuary, ordering himself to be denied to his creditors, absconding, &c. These are made descriptions of bankrupts, because they amount to declarations, that he is not able to pay his debts.

Lying in prison under arrest for a debt, above a stated time, is another description. So an escape after arrest for £100. The reason is, because they are tokens, that he is not able to pay his debts.

In the present case, the defendant goes to gaol, is brought up to be bailed, is bailed, and immediately surrendered from one gaol to another. In common parlance,

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If a man, under the insolvent debtor's act, is discharged by those who have no power, the gaoler is liable. *Salk.* 273. Yet there no force, or subtilty, is used to procure his enlargement.

I own, I do not believe, the legislature meant this should be an escape; but if one part of the act is to be construed nicely, so is the other.

Take both parts, then, as the legislature really meant, and we are right on the other point: or construe both nicely, and we are right here.

*Mr. Norton, e contra'.*

As to the escape.

It has been said, that the bankrupt-laws are to receive a beneficial construction. I admit they are, in every transaction after the party is a bankrupt; but, as to the act of bankruptcy, they are to be construed strictly, as becoming a bankrupt is considered as a crime; and this distinction will reconcile all the cases.

The act of parliament never intended this kind of an escape. If it did, it would be in the power of a sheriff to make any tradesman, who is arrested by him, a bankrupt; because by taking the prisoner out of his county, it would be a legal escape: for an escape it is *quoad* the sheriff; but not so as to prejudice the man who is innocent. That would be a dangerous doctrine.

From hence I may, I hope, lay down this general position, that "no man can be made a bankrupt by being "permitted by the sheriff to escape."

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is, as it clearly is, sufficient to hinder the bankruptcy from having relation to the time of the arrest; it would be hard, to draw the line, and say, every case is not within it.

Mr. *Burrell*, on the same side.

There is no such thing as an equitable, or constructive, bankruptcy, no more than constructive treasons.

The bankrupt acts are more than penal, in respect of the bankrupt, they are criminal; therefore, they ought to be expounded strictly as to the act of bankruptcy; but liberally when a man once is a bankrupt.

Lord *Mansfield*, C. J.

There is no doubt with the court, as to what is decisive of this case.

I was of opinion at the trial, that there was no escape.

I also thought, there must be a continuance in prison from the first arrest, to make the bankruptcy have relation to that time.

There is no general principle of law, on which a man can be a bankrupt: that depends on positive statutes.

But when laws have described who shall be bankrupts, the courts are to put such constructions on those laws as will tend to public convenience, to avoid frauds, and to attain the end of justice.

In this case, the dispute has been *de verbis controversia*.

1. The first question is, whether here was any escape

by the bankrupt? It is true, it is an escape, to make the officer liable for carrying the prisoner out of his jurisdiction. But that is not the question here: the point in this case is, whether this was an escape under the bankrupt-laws, which were, anciently, considered as penal laws?

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And I am of opinion, that, by *escape*, the legislature meant, the man's getting, by his own act, by wrong, out of the coercive power of the gaoler, &c. which was the means the creditor had of compelling payment; and, therefore, clearly this was no escape. He who never meant to escape, cannot be a criminal against his own will, therefore, he, substantially, still remains a prisoner.

2. As to the second question.

Upon considering the sense of the act of parliament, I was and am, most clearly, of opinion, that, in general, the continuance in prison is to be computed from the time of the surrender.

The arrest is no presumption of a man's inability to pay; as the richest tradesman may be arrested for a demand, which he thinks, perhaps, he is not liable to. But if a man lies so long in gaol, that he may be reasonably supposed to have had an opportunity to send to all his friends, (which reasonable time the law fixes at two months) and none will bail him, then insolvency may be presumed.

The case *Mr. Norton* put, of a bailing, and a long litigation before the matter was determined, shews the absurdity of supposing, the act meant the lying in prison should be computed from the arrest.

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Thus much as to the doctrine in general. But to come to this particular case.

The single question here is, whether such a turning over as this, at a judge's chambers, is to be considered as a bailing, or only, merely, the form of changing prisons?

And it seems to me, most clearly, that it is, in respect of this act of parliament, only a changing of the prison.

This question also, as well as the former, arises from the different meanings of the same word.

A bailing of this kind is, substantially, no more than a commitment to the *Marshalsea*. The bail never justify on these occasions: therefore, they are, in fact, no bail, no security to the plaintiff; he never troubles himself to inquire into their ability, but two beggars are sufficient for the purpose.

I am further confirmed in this opinion, by what, I am told, is the practice on applications for a *supersedeas*, for want of the plaintiff's proceeding against a prisoner in custody; which is, that on such surrenders as these, the time of lying in prison is computed from the first arrest, and not the time of this kind of bailment.

*Green* was, therefore, as to this purpose, never bailed at all, but only changed his prison.

There is no occasion then to draw a line, as has been mentioned.

*Denison, J.*

I am of the same opinion, as to both points.

1. If a person comes to render himself, it is no escape, no more than if the sheriff was to bring him up to *Westminster-hall*.

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An escape under this statute, must be a criminal act of the man himself.

2. If a man is arrested, and gives *sufficient bail*, his bankruptcy can only be from the time of the render by his bail. But here was no bail at all, as to this purpose. The bail in these cases do not justify, and, if they do not do that, they are, legally, no bail at all; this bailing, and surrender, is only a formal proceeding.

If the debtor is once out on sufficient bail, though for ever so little a time, I think the bankruptcy is to be computed only from the surrender.

*Foster, J.*

I am clearly of the same opinion.

1. The escape meant by this act of parliament, must be a criminal escape on the part of the defendant.

2. As to the other matter, I am as clear, that this was a continuance of the same arrest.

As to drawing the line, it is drawn. The case my Lord C. J. referred to is decisive, in point of the reason of it. Good bail, for ever so little a time, would be sufficient to interpose between, and separate, the two imprisonments. But if the party is only turned over, and never enlarged, it is, as to this, no bail at all.

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Wilmot, J.

The legislature meant, that, if a person lay in prison for two months, it should be an act of bankruptcy *ab initio*.

If he was out on good bail, it would be hard, that, at a distance of time, all his intermediate acts should be rescinded. But, where he lies in prison, it is very proper, they should be rescinded.

Here he was not a moment out of custody; but the bailment was a mere *fabula*, and fiction, and only amounted to a changing of prison.

The act of parliament mentions common, or hired, bail, which must be in contradistinction to good bail: and, in fact, and reality, here was no bail at all.

As to the escape.

The escape, within this act of parliament, must be in contradiction to his keeper; as to be a bankrupt is, in many respects, considered as criminal.

*Postea* to be indorsed, that he was a bankrupt on the 31st of *March*.

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that is, that the payment of 2s., which appeared in proof, materially varied the matter.

But I apprehend, that the plaintiff's right is an absolute right to bury; and there was no occasion for him to allege the payment; but that that is a collateral, and independent, matter, for which, if not paid, the churchwardens may take their proper remedy. It is a payment which is not due till the burial is completed; and here the disturbance was before that was over.

The right to bury is a *prescriptive right*; and the fee claimed by the churchwardens is a *customary fee*. That is different: the plaintiff had no occasion to allege, and set forth, any thing more than what it was that *he* claimed.

The case relied on at the trial was *Cro. Eliz.* 546. 563. *Lovelace v. Reynolds*; but there the payment was part of the prescription itself.

In answer to that, was then cited, and I now rely on, *Cro. Eliz.* 405. 5 *Co.* 78. b. S. C.

The payment here, I say, was due on an exercise of the right of burial, but not part of the prescription: the churchwardens must recover it by legal methods, as by libel in the spiritual court. 1 *Fent.* 274.

But, even supposing it was part of the prescription; what is that to the defendant, who is a wrong-doer? The fee, perhaps, might be applicable to repair the floor of the aisle; and it has been held, there is no necessity, in such an action as this, to allege repairs. 3 *Lev.* 73. and *Kenrick v. Taylor*, B. R. *Pasch.* 25 *Geo.* II. If there is no necessity to allege repairs, surely there is none to allege a payment for that purpose.



This case may be compared to that of stallage in a market, where, frequently, there is a sum paid to the lord of the soil; and there are cases of that kind in 2 *Lutw.* 1517. and 3 *Lev.* 119. In actions for a disturbance in the exercise of that right by a stranger, there is no occasion to allege the payment made to the lord.

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So, if a man is disturbed in a right of fishery: in an action against the wrong-doer, he need not allege, that he pays the first salmon, &c. that he catches in the season, to the lord, though, in fact, such payment is due, and made. Or if he is obliged to repair the banks of the river, in consideration of his exercising such right of free fishery, yet that needs not be alleged.

*Mr. Hall, e contr'.*

The payment of the 2s. is parcel of the prescription; for this is a prescription, and not a custom, under which all the inhabitants of *Oswestry* claim. And all prescriptions are to be taken strictly, and should be fully set forth, that the court may judge whether, upon the whole of them, they are legal. And as they must be set forth precisely, so they must be proved. And this appears by several cases. *Carth.* 241. *Palm.* 362. *Hob.* 209. *Cro. Eliz.* 415. *Carth.* 117. 2 *Ro. Abr.* 720. in prohibition.

The payment of the 2s. here, is, as I said before, parcel of the prescription; as ancient as the right of sepulture; they began at one, and the same, time, and cannot be disconnected: the one cannot exist without the other.

The payment is a condition precedent, as payments are held in divers cases. 2 *Hawk. P. C.* 151. *Sid.* 452. 2 *Jones*, 56. *Kely.* 25.

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As to the case of stallage, it is not like this; because, in general, every man may make use of a market, of common right. But if people claim exclusive rights, as here, it is necessary for them to shew the very manner in which they claim.

The court said, Mr. *Aston* need not reply.

Lord *Mansfield*, C. J.

This is an extremely plain case: and it has been made a question, by not observing the reason upon which the determinations in the books have gone.

There is a great difference between the cases where the claim is against the owner of the property, by a person having a right of servitude; and where the dispute is with a wrong-doer. In the first case, the owner holds his land, or other property, discharged from any charge, except what the other takes by deed, (which, if it be the case, should be set forth) or by prescription, which presupposes a deed, or some other reasonable commencement; and, therefore, he must claim according to that, because, otherwise, the prescriptive right, by being laid differently in different proceedings, which become records, would be lost. If he does not lay the whole, he does not claim according to his title.

Another reason which may be given, in cases between the owner, and the party who claims a servitude, why the whole should be set out, is, because the other party may reply, that he would have permitted the plaintiff to use his easement, &c. but that he refused to pay.

But here the disturbance is by a wrong-doer. All that is necessary to be set out in such a case, in order to re-

cover damages for the injury done, is, so much as may make it appear, that the wrong complained of by the plaintiff, has been done to him.

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And this is not like the cases Mr. *Hall* cited; where a man laid more than he needed, and proved contrary to it. Here he has proved all that he laid; but has not set out, that he ought, after the burial, to pay the church-wardens 2s.

It would be very doubtful to me, whether this payment is not another distinct prescription; but that is out of this case, because the dispute is not now with the church-wardens.

The distinction I have mentioned, reconciles all the authorities; and, in my opinion, the plaintiff's action is well founded, and supported.

*Denison, J.*

I am of the same opinion.

The point is, whether there is any variance between the prescription laid, and that proved.

The case of *Lovelace*, and *Reynolds*, was with the owner of the property; his claim was *sub modo*; and there it was held, he must set out the whole, because the owner would otherwise have no remedy for the money due; and the defendant had no common, at all, but upon the conditions of his prescription.

But here the action is against a wrong-doer; and the plaintiff, in that case, needs only allege sufficient to shew, that he was injured.

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I apprehend, the plaintiff might have maintained this action without shewing a prescriptive right; and it is extremely like the case of *Kenrick v. Taylor*.

These appear to me to be two distinct, separate, rights, according to *Grey v. Fletcher* (*Cro. El.* 405.)

*Foster, J.*

I think this payment can never be part of the prescription, because it extends to *all the world* who shall bury in that aisle.

*Wilmot, J.*

This case, I think, is not distinguishable from that of *Grey v. Fletcher*; and, in my opinion, this declaration would be good against the churchwardens themselves.

The act of the defendant tended to take away the right not only of the plaintiff, but of the churchwardens.

The difference between actions against wrong-doers, and the owners of the property, is established by many cases.

*Postea* to be delivered to the plaintiff.

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## MILLER v. RACE.—K. B.

THIS was a case reserved at the sittings before Lord *Mansfield*, which stated :

That *W. F.* being possessed of a bank note, payable to himself, *or bearer*, sent it in a letter directed to his correspondent in the country : that the mail was robbed, and the note came to the hands of the present plaintiff, for a valuable consideration : that he demanded payment of it of the defendant (who is a cashier of the Bank), who refused to pay it, and kept the note.

The case also states, that bank-notes pass as cash, by delivery only, without further inquiry into the title than the party's having possession.

Upon the defendant's refusal to deliver to the plaintiff the note, he brought *trover* for it.

*Mr. Williams* was going to argue for the plaintiff ; but, as the case was reserved at the request of the defendant, and the objections to the action were to come from him, Lord *Mansfield* directed him to begin.

*Sir Richard Lloyd, pro defendente.*

This is a case of great consequence, in which the currency of notes, and the interest of note-holders, are greatly concerned. The contest here is not with the Bank,

The bearer of a bank-note, is entitled to bring *trover*, to regain the possession of it, withheld at the instance of one who had formerly been robbed of the same.  
1 *Burr.* 452.  
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but between the plaintiff, and he who, in fact, is the owner of the note; and the defendant, or the Bank, is no more than a stake-holder.

One hardly knows, which side to wish success to, as it is hard on both sides of the question. The plaintiff paid money for the note, and the payee did the same also: one side therefore must innocently lose.

The question in this case, is not whether the plaintiff can recover the money due on the note; but whether he can recover the note, or paper?

There are many cases where a man would have a right to recover a demand, if he could but get into his hands the evidence necessary for that purpose, but yet has no right to the evidence. As, for instance, if a man has a bill of exchange, and only, at present, chooses to receive part of the money due on it, and, upon payment of so much as he now wants, leaves the bill with the payor: he has a right to the rest of the money, when he demands it; but cannot get the bill back, until he has repaid the sum which he formerly received upon it.

The plaintiff, therefore, in this case, may have a right to the money, and yet no right to the note.

But let us consider, what the plaintiff's right to the note may be.

He must claim either by assignment, or by considering the note, when it came to his hands, as a new note.

As to the first, the plaintiff has no right by assignment; for nobody can assign a right which he has not: robbery,

being a wrong, cannot divest a right; nor can the robber, who has no title, convey a title to another.

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That being so, let us see how the second way of claiming, will serve the plaintiff's turn.

As to the note being considered as a new note, that cannot be; the note is, in fact, the same. The furthest it can be carried is, to consider the Bank as making a new promise of payment to every new holder, each time the note changes hands.

Suppose a man had made a promise to pay £100, to any person who should be the bearer of a certain medal: if the medal is stole, the person who gets it from the robber, cannot recover it in trover, though he may recover the £100: change but the term note for medal, and the case is the same.

I do not say, whether the Bank can, or cannot, stop payment; it is a question which I do not wish to see determined, as it has its uses, as well as its inconveniences.

I am only considering the note itself, as a piece of property. The note now is in the hands of the defendant, to whom it was delivered in order for payment; he refuses to redeliver it, so that the plaintiff cannot, for want of his evidence, recover the money due on it. He is called upon, in this action, to deliver it: his excuse is, because the person who was robbed has employed him, as his agent, to retain it.

I take it to be clear, that a man who has been robbed, may seize his goods in whose hands soever they be, unless they have been sold in market overt (which cannot be the

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case of a bank note): in whose hands soever they are, the owner may bring trover.

Suppose in this case the note, instead of being in the hands of the now defendant, had been in the hands of the true owner: nobody could bring trover for it, I apprehend, against him, any more than for a horse, or a jewel. If the action would not lie against him, upon the same reasoning also, it will not lie against his servant.

I know, I shall hear it said, that the course of trade is to govern this case; and, for that purpose, the case states, "bank-notes pass as cash by the delivery only, without further inquiry into the title than possession."

But still the note is the thing that entitles the party to receive; and the question here is, who has a right to have that? We do not say, but that, by the course of trade, the money must be paid, when the note is produced. The case, I admit, states, that the note was delivered to the defendant for payment; but, if the plaintiff means to recover the money, he has mistaken his action; he should have brought an action against the Bank, for the money.

If the defendant cannot retain the note, the doctrine of an owner seizing his goods wherever he finds them, is at an end.

The plaintiff, I admit, may have a property against any body but the owner: here the defendant is the owner's agent.

There are few cases to be met with in the books applicable to this question; but, however, there are two or three.



*Salk.* 126. Lord *Raym.* 738. S.C. The defendant there had taken the note as cash, and *paid it away* as cash, before the action brought: but this case is different, as the plaintiff had the note in his hands. The finder there had a property as to all the world, but the true owner; but the owner might have had trover against him, whilst it was in his hands, though not when he had paid it away.

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That this is a good distinction, appears by *Salk.* 283-4, determined by *Hult*, C. J. about two years afterwards, where his words are very strong.

1 *Str.* 505. That case I only mention to shew, what kind of property a finder has.

In a word, the note is to be considered as any other piece of property; no action, therefore, lies for it against the owner.

The course of trade only means, that it shall pass as cash.

*Mr. Williams, pro quer'.*

The question is, whether the holder, for a valuable consideration, of a note payable to bearer, has not a property in the note?

If he has a property in it, it is admitted, that trover will lie.

I hope it will appear, that he has a property, for three reasons:

1. Because the usage of trade vests a property in the

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holder for a valuable consideration, though against the consent of the owner.

2. Because of the great importance with respect to trade, that the possession should carry the property.

3. Because this case is within the reason of sales in a market overt.

1. These notes were designed to answer a deficiency of cash; and are of that use, that not a tenth part of the trade of this kingdom could be carried on without them: they are become a medium for commerce.

Questions, therefore, arising on these cash notes, are to be determined by the principle which governs in cases of trade; that is, by considering the usage of trade as part of the law. And on this principle it is, that an indorsement on a bill of lading, conveys not only the bill of lading, but the property in the freight, though it is a chose in action, and so not assignable by the rules of the common law.

So, bills of exchange pass by indorsement: so in the case of policies of insurance: by an indorsement on the policy, not only the trust may be declared, but a legal interest passes; and he, who, in common cases, would only have an equitable title, as *cestui que trust*, may maintain an action at law. So actions of freight lie by one joint part-owner of a ship. 3 *Keb.* 444.

The reason of all these cases is, because the usage of trade makes the law.

This usage in trade prevails even against express acts

of parliament: a parol acceptance is binding, which is contrary to the statute of frauds. *Str.* 1000. 1 *Salk.* 23. (53.)

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If a draft is forged, after acceptance, the acceptor must pay. *Str.* 946. The law would rather an innocent man should be a loser, than the credit of these kind of notes suffer.

The indorsee of a forged bill of exchange may bring an action against the indorser.

These notes, payable to a man, or bearer, pass by delivery only. The holder is considered as the true owner; and the note is, to all intents, looked upon as cash. If the robbery had been of current cash, and it had come to Mr. M., the owner could never have recovered it: that will not be contended.

If the usage, then, is to determine the question, that is, on the state of the case, strongly with us.

2. If the convenience of paper credit is to determine it, it is with us. In *Salk.* 126. 5. Lord *Holt* has, on these principles, determined this very point in the way we contend for.

It is a maxim of law, that it is much better to endure a particular mischief, than a general inconvenience: here the hardship of the loser of the note is only a particular hardship.

It is also worth observing, that Mr. F. was guilty of some laches; for, had he sent down a bank-post-bill, this inconvenience could not have arisen. If, then, one side

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must suffer, the loss should fall upon him who has suffered some laches.

But, putting that out of the case, be the hardship how it will, general inconvenience will have greater weight. That is too glaring to be argued: for how can the holder of the note trace the title through, perhaps, 500 hands? and yet so far *Sr. Richd's* argument tends. According to his doctrine, if a *feme covert*, or an infant, was to pay away a note, there would be a link wanting in the title.

3. As to a sale in market overt: that seems applicable to this case. The title the purchaser there claims is at the common law, founded on a regard to trade. If the buyer purchases in a market overt, for a valuable consideration, without covin, he will be protected against the true owner. 2 Inst. 713.

Apply that here: the plaintiff was a purchaser for a good consideration, in the usual course of trade, without covin. I admit, there is no place particularly appropriated for sale of these bills; but usage has made all places markets overt as to them.

I come now to consider *Sr. Richd's* argument.

He says, there is a difference between recovering the money due on the note, and recovering the paper itself.

If we have a right to the money, that will attract the right to the note; as writings the box they are in.

The right I contend for, is not by assignment under the robber: this is not a matter assignable: we claim the property merely as possessor: I do not contend, that the robber had any right.

Sr. *Richd.* says, an owner may seize his goods wherever he finds them.

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If circulation has altered the property, the true owner's remedy is gone; and if the original owner was to find it, when lost by the holder for a valuable consideration, trover would lie even against him for it.

It is said, the action should have been brought for the money. How could we do that, without producing the note? But, be that as it may; whether we could bring that action, or not, still we may have this.

Having a right against every body but the true owner, is no right at all.

The case Sr. *Richd.* mentioned from *Salk.* and Lord *Raym.* does not warrant his observation upon it.

As to his other case from *Salk.*, Lord *Holt* only means, that trover would lie against the first finder, or one who held them not in the course of trade: that is agreeable to the subject matter of the case then under his consideration. Besides, million-lottery-tickets are not considered as cash, as these bills are: that case, therefore, is strong on the part of the plaintiff.

The case from *Str.* also does not clash with my doctrine: here we are not the finder.

Sr. *Richd. Lloyd's* reply.

The plaintiff, I admit, must recover against the bank, by being the bearer of the bill; but that does not prove, that he can recover the bill against the true owner.

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I never, before, heard it said, that possession carries the property. The rule, I take it, is, that the property of personal matters carries the possession.

This, says Mr. *Williams*, is to be considered as mercantile cash. As cash, I own, which has an ear mark: but not as our currency, which has no ear mark, and therefore trover will not lie for it; but here is an ear mark, and, therefore, it is much better likened to a medal.

Bills of exchange, 'tis said, are cash. Suppose the owner is robbed of it, may he not bring trover for it? The stealing does not take away the property.

It was not felony to steal these notes, till made so by statute: that shews, what they were in consideration of law: they were considered as mere bits of paper, only.

That these notes pass as cash, does not affect this question; for bad money may pass as money.

The reason why the indorser of a forged note is liable, is, because his indorsement makes it a new note.

This matter stood for judgment, after this argument, for four, or five, days; when the opinion of the court was given by Lord *Mansfield*, to the following effect:

Lord *Mansfield*, C. J.

I was clear at the trial, and am still of the same opinion, that, from the consequences only, (without entering into any further considerations,) the plaintiff has a clear right to recover in this action; since, by usage, and the common

course of business, these notes are become the same as cash; and any thing that would check, or interrupt their currency, would be of the worst consequence.

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It has been ingeniously argued on the part of the defendant; but the fallacy lies in comparing the note to things substantially different: it is neither goods, nor security for money, nor any document of a debt, but as much money as a guinea is, which appears by the receipts given by bankers, on your paying bank notes into their hands: their receipt is not for the specific bank-notes, but for so much money: which is so well understood, that they are commonly called paper money. Money, properly speaking, is whatever common consent has fixed upon as a sign denoting a certain value; and though, commonly, of gold, or silver, yet, sometimes, of mixed metals: and leather stamped has been used; so may paper; seeing, whatever the material is, common consent may make it money, to all intents, and purposes; and that bank-notes are so received, and not considered as documents of a debt, or securities for money only, appears from many determinations.

1. A man devised all his securities for money: it was held, bank notes did not pass.

2. "All my ready money, or cash:" it was held, they did pass.

3. By a devise of "all in my house:" it was held, that securities for money did not pass, agreeably to a sensible distinction of *Domat*; that they are not the thing itself, but merely the evidences of it: but bank-notes were held to pass, because not securities, but money. This was Lord

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*Aylesbury's case*, where he left about £100 in specie, and £900 in bank-notes; and they were held to pass.

4. In the case of a bankrupt, where he has any specific things in his custody, that are the property of J. S., he may demand them of the assignees, having a lien upon them: and, therefore, if certain specific drafts, and bills, are remitted by him to the bankrupt, to be applied for particular purposes, and, before the money is received upon them, the bankruptcy happens; he has a right to have them again, and shall not be bound to come in as a creditor: but, had the remittance been in bank notes, it had been otherwise, because they are considered as specie.

The use of current specie is, that, where it passes from one to another for good consideration, and without collusion, it can never be traced, or demanded, by any former possessor: which has given rise to a quaint expression (which, however, is not warranted by the fact), that money has no ear mark, and therefore cannot be followed. Now this is not true; for money, when it can be distinguished (as some particular pieces may, or in a purse), may be followed, as far as a bank-note may. In either case, between the true man, and the thief, it may be followed, and so against a mere finder; but, in neither case, against third persons, not being privies, &c. and paying a valuable consideration. And though it should be money out of a purse, and not distinguishable from other specie, yet an action for money had, and received, for the owner's use, would lie against the finder, or those to whom he has disposed of it without a valuable consideration; and so it was held by Lord *Macclesfield*, in the case of *Thomas v. Whip*, 1 Geo. 1. where an administrator brought assumpsit against the defendant, for money had, and received, &c. The case was, the defendant was nurse to the intestate in



his last sickness, and, after he was dead, took the money; and the C. J. held the action maintainable in that case, because though the taking was wrongful, yet the tort may be waived, and the action for money had and received lies: and the reason is, from the currency being not at all affected by any contest between the owner, and the finder; as it would if third persons, who had paid a valuable consideration, were liable.

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This case is extremely clear, if it stood on general principles; but there are authorities in point. *Salk.* 126. (which was 10 *W.* 3.) and Lord *Raym.* 738. in the same year, both before *Holt*, C. J.; and the case of the lottery tickets, *Salk.* 283. which was two years afterwards before *Holt*: where the reporter, through inattention, throwing in the word bank-notes, along with lottery-tickets, and exchequer bills (from both which it is as different as possible), makes him contradict himself; but this is clearly a mistake of the reporter. The value of lottery tickets depends on the identity, and another number will not answer it: but one bank note for £100 is just as good as another for that sum, and, therefore, may be paid in satisfaction of it; and, if it were not so, it would follow, that, if I paid a bank note into my banker's, he could not pay it away to another, but must return it specifically to me, which would, presently, put a stop to this paper currency. This regard to usage appears by *Walmsley v. Child*, before Lord *Hurdwicke*, C. 11 Dec. 1749: plaintiff had a note of Mr. *Child's* shop, payable to bearer, and lost it. He apprised the shop of it, and a considerable time afterwards (the note not being heard of), applied to the defendant for a new note of like tenor: defendant said, he would give him one, if he would (as is required at the bank), give security, with two sureties, to indemnify him if it should chance to come to

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light; for that, in that case, he should be bound to pay it to the bearer, and would not hazard the credit of his shop by contesting it. The plaintiff refused to comply with this, but offered to release, &c. on being paid the money: the defendant refused to pay with this security. The plaintiff brought his bill, to compel the defendant to give him another note: but the Chancellor was clear, Mr. *Child's* demand of security was reasonable, and according to the known usage: and said, Lord Chancellor *King* had told him, that, having lost a bank-note, he applied to the bank for a new one, but, they not accepting of his security alone for £100, he was obliged to bring two sureties: and the bill was dismissed.

In this case we are all clear, that the action is well brought: therefore let the *postea* be delivered to the plaintiff.

See Dyer, 23, b. pl. 146, *in marg.*

### THE KING *agt.* ISHERWOOD.—K. B.

On the deposition of two persons, to the offer of a bribe by the defendant at an election, an information is conceded.

THIS was an application for leave to file an information against the defendant, a brewer at *New Windsor*, for attempting to bribe one *Goad*, a fishmonger, and burgess of that place, to vote for Mr. *Fox*, at the late election for members to serve in parliament there: when *Goad* told him, he could not vote so, for he had engaged to vote for Mr. *Bowles* (the other candidate), the defendant offered him £50, if he would go out of the town, and not vote at all. This was expressly sworn by *Goad*, and his

wife; and now as positively denied by the affidavit of the defendant alone, unaccompanied with any other evidence.

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This, his counsel urged, was a direct answer to the charge: and, therefore, as another remedy, by indictment, might be resorted to, they hoped the court would not interpose in this extraordinary manner.

On the other side, the enormity of the transaction, and the doubt, at least, whether the defendant was not guilty, seeing there were two positive oaths against the single testimony of the party accused, was urged as a sufficient inducement for the court to grant the information, and put the matter in a way of trial. And the cases of *Rex v. Justice*, and *Rex v. Rose*, relating to bribery in election of officers of much less consequence (viz. a mayor of *Abingdon*), were relied on as authorities in point: where, though the charge was by one witness alone, and, in the nature of it, attended with circumstances of improbability, and positively denied by the accused party, accompanied by the affidavits of other persons, that they did not think him capable of committing such an offence, &c. yet, the charge being positive, the court held it a matter proper to be tried, and granted the information.

Lord Mansfield, C. J.

Any way to obstruct the freedom of elections, whether by bribing to vote, or to forbear to vote, is a very heinous offence, and proper for the animadversion of this court by information; but, as there are other remedies (indictment at common law, and the popular action for £500, on the \*statute), the court are not bound to interpose, provided the scales hang even, which they do not in this case; seeing here are the positive oaths of two persons

\* 2. G. 2. c. 24.

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against the single denial of the accused person; therefore, I think, the rule ought to be made absolute.

*Denison, J.* concurred.

*Foster, J.*

We all know, how high party runs amongst country-gentlemen, who compose grand juries at the assizes. This court is of no party, and, I am afraid, almost the only place where party does not prevail; therefore, it is almost necessary we should interpose.

*Wilmot, J.* said,

The offence was of so heinous a nature, as to be truly "*vindice dignus*;" and that the thunder of this court ought to be lanced against it. And he seemed to be of opinion, that, had the charge been supported by *one witness only*, and denied by the defendant, the information ought to have gone.

Rule made absolute.

### HUTCHINS *agt.* WHITAKER, Esq. *and others.* K.B.

In *trespass*, for taking an excessive distress; held, that, the plaintiff's remedy was *in case*, on the statute of Marlbridge, 52. H. 3. c. 4.

also that *averia carucae*, may be distrained for a poors' rate, &c. 1. *Burr.* 579. S. C.

TRESPASS, for taking eight geldings, against nine defendants, viz. two justices of the peace, a constable, a churchwarden, two overseers of the poor, and three other persons, who aided in executing the warrant of distress. On not guilty, the special matter was given in evidence, before *Willes, C. J.*, at *Kingston*, Summer assizes, 1755: verdict for the plaintiff, and £37. 4s. 6d. damages, subject to the opinion of the court, on the following case.

The plaintiff was an inhabitant of the parish of *Barnes*, in *Surrey*: a rate was made, the 28th of *July*, 1754, on the inhabitants there, for the relief of the poor, and for paying *tradesmen's bills, for repairing the parish-houses*. The plaintiff's proportion was £28. 10s. The rate was allowed by two justices, and published in the church on the 1st of *November*. On the 2d, payment was demanded of the plaintiff, and refused. A warrant of distress was issued by the two justices on the 15th of *November*, and executed by the other defendants on the same day: when they entered the plaintiff's stable, and distrained five geldings (being beasts used by him for the plough, and cart), and left notice of the distress at his dwelling-house. That they afterwards appraised, and sold the same; and the net produce, after deducting charges, was £16, and a fraction; so there remained above £12 due of the rate. That on the 20th of *December*, they distrained three more of the plaintiff's geldings, under the same warrant, and appraised, and sold them for £37. 16s., and, after deducting the remainder of the rate, and charges, paid the surplus to the plaintiff's son for his use. That at, and before, the first distress, there were other goods on the premises (besides beasts of the plough), to a much greater value than the amount of the rate.

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Mr. *Knowler*, for the plaintiff, divided the case into five points.

1. Whether the rate be good; and, if not, whether the plaintiff may avail himself of his objections?
2. Whether the warrant, not having prescribed any time for the sale of the distress (according to 27 *Geo. 2. ch. 20.*) be not therefore void?

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3. Whether the second distress was justifiable?

4. Whether beasts of the plough may be distrained?

5. Whether the action is maintainable against all, or any, and which of the defendants?

1. This question arises on 43 *Eliz.*, which directs the rate to be weekly, or otherwise, on every inhabitant, occupier, &c. Here it is on the inhabitants only, which, upon this act, must be confined to the persons resident, and will not include occupiers, 2 *Buls.* 354. 2dly. The act says weekly, or otherwise: here the rate is indefinite; and a standing rate cannot be, because they must be equal, and therefore vary according to circumstances. *Salk.* 526. And *Holt* determined a quarterly rate to be bad, and that it should be monthly, because of the frequent changes of occupiers, &c. *Salk.* 532. Lord *Raym.* 1039. Case determined on the principle laid down in *Plow.* 307.

These objections are to the substance; and therefore not amendable by 17 *Geo.* 2.

2. The act of 27 *Geo.* 2. ch. 20., says, that justices shall and may, in their warrant, limit the time for selling the distress, which is compulsory, and does not leave it to their discretion. *Carth.* 294. and *Skin.* : and that they must pursue their power, appears by *Hob.* 298. *Plow.* 130. The justices then, by granting this void warrant, are trespassers, and the others are so for executing it; for, it not being by virtue of their general jurisdiction, but under a particular authority, which they have not pursued, their warrant is no justification to their ministers. *Cro. Car.* 394. *Str.* 1002. 8 *Co.* 121.

3. Whether a second distress is authorized by 43 *Eliz.*, must be examined by the rules of the common law, which is the surest way of interpreting general clauses of any statute. At common law, two distresses could not be one after another for the same thing, and the party might have a writ of recaption. *Cro. Eliz.* 13. *Moore*, 7.; and this in all other cases, as well as a distress for rent: *Lutw.* 1532.; and here was no pretence for it, seeing there were other goods sufficient on the premises. The warrant, being once executed, lost its force, and became as waste paper, and, therefore, was no authority for a second distress.

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4. Beasts of the plough are privileged for the sake of agriculture: they are not distrainable, whilst other goods are to be found, by the statute *de districtionibus scaccarii*: and this Lord Coke, in 2 Inst. 133. says, extends to all distresses, and to executions; and is only declaratory of the common law: and the 43 *Eliz.*, giving a distress in this particular instance, does not introduce any new law in the manner of distraining; as the statute of *Winton* does not extend to robberies in the night.

5. The action is maintainable against all the parties: and the terms of the act of 24 *Geo.* 2., for rendering justices, and other peace officers, safe in the execution of their office, have been complied with. 1. The justices have allowed a rate not warranted by law. 2. They have issued a void warrant of distress, and so have authorized the trespass. 3. All the others, are ministers in executing a void warrant, made under a particular jurisdiction; and again, by taking a second distress, under colour of the same warrant; which could not be, though the warrant had been regular for the first distress.

Mr. Gould, for the defendants.

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1. If the parties were aggrieved by the rate, their remedy is by appeal, not by this action. *Carth.* 346.

2. If the justices ought to have specified in their warrant at the end of how many days the distress should be sold, yet the omission of that will not make it void, but, the justices are punishable, if it was omitted *malto animo*.

3. It is not found, that the defendants knew at the time, that the first distress would not be sufficient. Besides, this is *pro bono publico*, a charity: and not like a distress for rent to a private person, but to be construed liberally.

4. The privilege of beasts of the plough, is only on distresses for rent. *Comb.* 417. *Lord Rayn.* 386. and 5 *Mod.*

Besides, here it is said, they were used for plough, and cart; now beasts for a cart are not privileged. 1 *Sid.* 422. 2 *Keb.* 595. 22 *Ed.* 4. 50.

*Cur'.*

No exception can be taken to the rate, in this action, but ought to have been by appeal. So that the points for the next argument will be: 1st, whether beasts of the plough are privileged in these kind of distresses; and whether any modern cases are to that purpose; and the practice of late, on these distresses, hath not been to take them indiscriminately? 2dly, Whether a second distress in these cases be illegal? 3dly, If not, yet whether this second distress was not excessive, being of so much more than was due?

Stands for another argument.



*Easter Term, 31 Geo. II. 1758.*

This case was now argued, by Mr. *Stowe*,  
for the plaintiff; and Mr. *Williams*, for  
the defendants.

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Mr. *Stowe*.

The points to be spoken to, are,

1st. Whether a second distress could be taken, having  
been upon the premises, when the first was made?

2. Whether beasts of the plough may be distrained in  
this case, there being other sufficient distress?

3. Whether the second distress was not excessive?

1. At common law, a double distress could not be  
taken. *Cro. Eliz.* 13. *Moore*, 7. *Lutw.* 1532. F. N. B.  
title Recaption. 8 Co. 50.

And distresses given by the statutes, are to be inter-  
preted by the same rules as those at common law:  
1 Inst. 272: and particularly in this case, because the  
statute 27 Geo. II. c. 20. allows the officer the expense of  
making the distress; so that not only the vexation is  
double, but also a double expense falls on the party  
distrained.

The warrant had performed its office, when one distress  
had been made, sufficient being on the land to answer  
the whole. No authority shews, that a distress of this  
kind is entitled to any particular favour.

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2. At common law, beasts of the plough are not distrainable: 1 Inst. 47, a. So, by statute 51 H. 3. *de districtione scaccii*, which extends to executions, 2 Inst. 133. *Dyer*, 312; and this appears from the words of the statute, "whereon the debt may be levied:" whereas, before the act of W. 3., distresses were only pledges, and could not be sold, therefore the word *levied*, must be applied to executions.

The statute of *Westm.* 2d., which gives the *elegit*, excepts beasts of the plough. 1 Inst. 289. b. 2 Inst. 133.

3. The plaintiff's share of the rate was £29. 6s.: the first distress produced £21. 9s.; and, after deducting charges, £16. 3s. 7d. being applied towards answering the assessment, £13. 2s. 5d. only remained: yet they distrained three geldings, value £37. 16s., which is three times the sum to be levied, and of distinct things; so that, in every view, distraining two had been sufficient; and the case of three oxen for 1d. &c. are only put as striking instances. 1 Ro. Ab. 674. 1 Inst. 107. The court may take notice, on the face of the pleadings, that the distress is excessive. *Hil.* 28 G. II. *Moir v. Mundy*, in this court: action for assault, imprisonment, and taking away eight oz. of gold, and 100 oz. of silver. Defendant justified, under a by-law of the corporation of *Oxford*, as distraining for a penalty of 6s. 8d. The court there said, the distress appeared excessive on the face of the pleadings, and gave judgment for the plaintiff.

Mr. *Williams*, for the defendants.

Whether beasts of the plough were, in this case, well distrained, is the only question that affects the first distress: the other two are applicable to the second only;

and that is laid in distinct counts, as different trespasses, and the damages are entire, so that the plaintiff must shew, both were trespasses, or the defendants must have judgment.

I shall take the second question first.

2. And this depends on the statute 43 *Eliz.*, which creates a new duty, a provision for the poor throughout the kingdom, and is, therefore, *pro bono publico*. A remedy for it is given by distress, and sale, or by imprisonment, if no distress: thus providing the most speedy, and effectual, remedy that could be invented.

It is a mere personal charge, and though it arises in respect of the occupation of lands, &c., yet does not arise out of them.

In some respects, it is in nature of a distress at common law; *e. g. a replevin will lie*: yet it is more like an execution.

On the side of the plaintiff, it has been considered merely as a distress at common law: which being only as a pledge, and to remain unsold, &c. till the owner redeem it by paying, &c. the policy of the common law privileged beasts of the plough, and the implements of trade, because, the locking them up was a public loss, as ground might remain untilld, and people could not follow their trades without them; and the damage which the creditor sustained in his private capacity, was to yield to the public good; besides, in common law-distresses, that would be defeating the very end of the distress, as it would deprive the debtor of the only means he had of paying his debt, to wit, following his employment, and earning money, &c.

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But here the case is quite different: the distress may be sold; and this distress is also *pro bono publico*, and the damage only to the private person, and that through his own obstinacy.

That a difference may be shewn, between distresses for the public good, and for private persons, appears by 1 Lord *Raym.* 386. Sir *T. Raym.* 232. 2 *Lev.* 96. *Cro. Eliz.* 710.

Mr. *Stowe's* argument, that the statute 51 *H. 3.* extends to executions, cannot be supported; and the authority from 2 *Inst.* 133. to that purpose, appears to be one of the very few mistakes which that excellent author has committed, in that excellent work.

That it cannot be so, appears from these reasons.

1. The statute was, merely, to prevent oppression by the king's bailiffs, or lords of leets, claiming under the crown; the king, by his prerogative, having, at common law, a power to sell the distress; and this extends to cases only where the debt was levied by distress.

2. By that act, sheep are privileged: but daily experience shews, that they are taken to be distrainable.

3. If it had extended to executions, yet the 43 *Eliz.* is a virtual repeal of it, in this case.

And if the plaintiff would have availed himself of that statute, he should have counted specially upon it, as writs are formed upon it. *Reg.* 97. b. *F. N. B.* 90. And this was resolved, *Str.* 851. 3 *Lev.* 48.

The principles relating to distresses for rent, are not applicable to distresses for personal duties, which are in the nature of executions: for, in the former, the cattle, &c. of a stranger on the land may be taken: but, it is otherwise, in the latter. That this is in the nature of an execution, appears by *Cases temp. W. III.*'s 388. And where, the proceedings are removed to this court, before the rate is levied, the court, if they confirm it, levy the money by *levari fac.*

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The exception, in the statute of *Westm. 2d.*, of beasts of the plough, is a strong argument, that executions were not within 51 *Hen. 3.*

Daily practice ought to have great weight against arguments drawn from a doctrine grown obsolete, and perhaps unknown to every parish overseer in *England.*

Here it was better for the plaintiff, that his horses should be taken than other goods, seeing, they are always saleable, and no abatement, as on second-hand goods.

It appears, by the passage cited out of *Sid.* on the last argument, that beasts of the cart are not privileged, and here they are of the plough, and cart. And by *Bract.*, lib. 4. fol. 274., it appears, that oxen only were considered as beasts of the plough.

1. The cases cited of double distresses, are, where £100 were due, and the party would distrain only for £50 at a time: but here it proceeded from a tenderness not to take too much. Suppose two candlesticks had been taken, under an apprehension, that they were silver, and they should prove only French plate, surely the party

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might distrain again. It does not appear, the defendants *knew*, there were other goods; they might be locked up.

If a sheriff levies too little, he may, at any time before the return of the execution, take more, for the command is to levy the debt: so is the warrant here, and, it cannot be said to have done its office, till that is done.

3. If the distress was excessive, the action should have been brought upon the statute, and trespass generally will not lie. *Str.* 851. 3 *Lev.* 48.

Upon the whole, I hope, that the first distress, at least, was good; and then the plaintiff cannot have judgment, as the damages are entire, on the whole declaration. That a second distress might, in this case, be taken, that the whole sum might be levied.



That the second distress was not excessive: and, if it had, the action ought to have been founded on the statute, and not mere trespass.

N.B. *Mr. Williams* alluded to 3 *Salk.* 198. as having determined the point as to the *averia caruæ*; but, as it was no authority, he did not rely on it.

### *Reply.*

The sheriff cannot enter again, and take more goods, if there were sufficient when he first entered; and in *Moore* 7. it is said to be his folly, if he does not distrain sufficient at first.

After a few days, taken to consider of the case, Lord *Mansfield* gave judgment as follows.

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Lord *Mansfield*, C. J.

Two questions were laid out of the case on the first argument, so that there now remain to be determined, *viz.*

1. Whether the horses here, being *averia caruæ*, were distrainable under 43 *Eliz.*, other sufficient distress being then on the premises? and this goes to the first distress.

2. Whether the second distress was lawful, enough being on the premises when the first was made?

3. If it was lawful in other respects, whether it was not excessive?

1. On this question, a great deal of learning might be entered into, relative to the old, common law, distress, which was a kind of *nomine pænæ*, or coercion, in the nature of imprisonment of the party's body, to compel the debtor to pay, but not, in itself, a satisfaction. The many hardships arising, in ancient times, on this kind of distress, gave rise to the statute of *Marlbridge*, that the creditor might not distrain greatly more than the value of the demand, which might rot, or spoil, without benefit to either party.

The solid distinction is, that the seizure under 43 *Eliz.*, and such like acts, is but in part analogous to a distress at common law, as being replevable; but much more so to the common law-execution, because the goods are to be sold, as a satisfaction for, and in payment

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of, the demand. This is a full answer to all the arguments drawn from the ancient, common law, distress. The reasons to the party, and the public, are not the same as when distresses were kept locked up, because then no use could be made of the cattle, or of the implements of a man's trade.

But the system of things is now extremely different: and though arguments drawn from that alone might be sufficient to determine this question, yet it does not rest solely upon argument at large. The case in 3 *Salk.* though not cited as an authority, is expressly in point: that indeed is not to be relied on; but *Holt's* opinion, Lord *Raym.* 386., is full to this purpose.

The statute of *Eliz.* speaks of goods generally, and therefore is a repeal of the statute of *Marlbridge*, as to this.

Upon the foundation, therefore, of this being like an execution, we are of opinion, that the *averia carucæ* may be distrained.

So there is no objection to the first distress.

2. The distinction taken by Mr. *Williams*, in his very earned, and ingenious, argument, is extremely supported by law, reason, and convenience: and is this, that where the demand is of an entire sum, as £100, the creditor shall not split it into *aliquot* parts, and make distresses for two £50, or five £20; but where he distrains for the whole sum, at the same time, and takes too little by mistake, he may distrain again: and the contrary would be of serious consequences, as the value of several things, as pictures,

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jewels, &c. depends greatly on caprice. What infinite difference is there in the value of horses: many are not worth £5, and we have heard of £1500 having been given.

Is the officer, at his peril, to judge of the value of them?

If what is contended for, by the plaintiff, under this head, was as he insists, the party must then, in all cases, take an excessive distress, that he might be sure he had enough.

Indeed if the party knew at the time, that what he took was certainly insufficient, it might be a very different case.

3. Whether this second distress was excessive, or not, needs not be determined, as we are all of opinion, according to *Str.* 851., that trespass will not lie, but case on the statute of *Marlbridge*.

As to the case of *Moir v. Mundy*, in this court, *H.* 28 G. II., which, being trespass, seems to the contrary; it depended on its particular circumstances. The distress was held excessive on the face of it, at the time, because gold, and silver, are the measure of the value of property; and it was the same as if £100, in specie, had been distrained: but it was laid down as clear, that, in all other cases of distress, except where gold, or silver, is distrained, a general action of trespass will not lie, but case on the statute.

Whether the distinction taken in that case, as to the gold, or silver, was sufficient to warrant the determination, needs not be here determined.

Judgment of nonsuit against the plaintiff.

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WORSLEY, and another, assignees of SCLADER, a bankrupt, *agt.* ISAAC DEMATTOS, the bargainee in a bill of sale of the bankrupt's stock, &c.—K. B.

A deed conveying *all* the effects of a trader to one of his creditors, under which possession was not taken, till it became necessary, to prevent the operation of the statute; is adjudged fraudulent, and an act of bankruptcy, within the scope of the 1st *Jac.* 1. c. 15.  
1. *Burr.* 467. S. C.

THIS was an issue out of Chancery.

1. Whether S. was a bankrupt? which was agreed, past dispute.

2. If a bankrupt, whether he became so on the 23d *Oct.*, or not till the 13th *Nov.*?

The cause was tried before Lord *Mansfield*, C. J., and he now, shortly, stated the evidence relative to this last question, to the following effect, *viz.*

The bankrupt was a brewer, malster, and mealman; and had a mill, and some ground belonging to it, his own property, for a term of years, which was mortgaged to J. D.: that he employed an agent, or banker, in *London*, to answer his drafts, &c.: that having had disputes, and broken off correspondence with his former banker, he, in *July*, came to *London*, to settle a correspondence of that sort with *Demattos*, who agreed, that if he would give him security, to indemnify him, as far as £1500, he might be at liberty to draw on him for £2000. This was then agreed upon, but no particular security: that was left to the attorney employed by both parties, who says, that *Demattos* expected the security presently, but it could not be offered till the deeds relating to the mill, &c. were got out of the former mortgagee's hands. That this could not be done, nor the deed prepared, till *Octbr.*

That, in the mean time, *Demattos* paid, or made himself liable to pay, drafts of the bankrupt to the amount of £500: that on 23d *Octbr.*, a deed was made reciting the above agreement, in consideration whereof, and of 5*s.*, the mill, &c. were assigned to the defendant; and, in further pursuance of the agreement, all the brewing utensils, &c., and all the changeable stock, malt, hops, flour, &c. are bargained, and sold, to the defendant, as a security to indemnify him for all monies he should advance on the bankrupt's account. There was a receipt for the 5*s.* consideration, indorsed.

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The bankrupt continued possessed till the 13th *Nov.* when (in contemplation of his intended bankruptcy), the defendant took possession of them by virtue of his bill of sale, and, the same day, S. committed an act of bankruptcy (as it was agreed he should), by denying himself to his creditors. So that the only question is, whether the deed itself, attended with the above circumstances, was, or was not, an act of bankruptcy on the 23d of *October*, within the meaning of 1 *Jac.* 1. c. 15.: the words there are, "make, or cause to be made, any fraudulent grant, or conveyance, of his, her, or their lands, tenements, goods, or chattels, to the intent, or whereby their creditors shall, or may be defeated, or delayed, from recovering their just debts."

Serjt. *Prime*, for the plaintiff.]

Here is fraud apparent: no consideration but 5*s.*: no inventory, or valuation, of the goods: the bargainer continues in possession: these are all badges of fraud, according to *Twyne's* case, 3 *Co.* 80.; and whether the sale be absolute, or only conditional, makes no difference, the mischief is the same.

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Mr. *Gould*, on the same side.

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The scope of all the bankrupt-laws, is an equal distribution of the effects among all the creditors, and, to this end, they are to be liberally interpreted, and any thing tending to partiality to be discountenanced. In the same sessions of parliament, that the second statute was made in against bankrupts, which was that of 13 *Eliz.* (the first being 34 & 35 *H. 8.*) the general law against fraudulent conveyances, on which *Twyne's* case was founded, was made; but the legislature did not then think fit to make the execution of such a deed to be, of itself, an act of bankruptcy: but afterwards, finding new devices were invented to evade the bankrupt laws, this was, by 1 *Jac. 1.*, declared an act of bankruptcy; and, therefore, if it was a fraudulent conveyance by 13 *Eliz.*, it is now, by 1 *Jac. 1.*, an act of bankruptcy.

That fraud apparent needs not be found by the jury, but collected by the court, appears from 2 *Inst.* 110. 6 *Co.* 76. *Moore*, 193. *Sty.* 288.

2 *P. Wms.* 427. *Small v. Oudley*, where, though an assignment of a particular part of the bankrupt's effects to one of his creditors, just before, and in contemplation of his bankruptcy, in order to give him a preference without his privity, was held to be good; yet *Jekyll*, the Master of the Rolls, said, had it been of all his effects generally (as here) it would hardly have stood.

Serjt. *Davy*, on the same side.

The 1st *Jac.* is more express than the 13 *Eliz.*, which was the foundation of *Twyne's* case, and, therefore, that is an authority in point.

The C. J. said, that Lord *Talbot* having, in the case of *Shepherd v. Pool*, held, there was no difference (as to personal chattels) between an absolute, and a conditional, sale, or mortgage, of them; the point came solemnly before the court of Chancery, in the case of *Ryall v. Rolle*, where the Chancellor, assisted by the Master of the Rolls, and three judges, on the 27th of *January*, 1749, confirmed Lord *Talbot's* opinion; and said, it differed widely from mortgages of real estates, because there the known, and constant, practice, is, for the mortgagor to continue in possession.

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Mr. *Norton*, for the defendant, observed, that no cases had been cited of acts of bankruptcy on this clause of the statute, though there have been several.

1. This is not a fraudulent conveyance within 13 *Eliz.*
2. If it was, yet it does not amount to an act of bankruptcy within 1 *Jac.* 1.

The statute of 13 *Eliz.* saves all deeds made *bonâ fide*, for good consideration.

This was a fair, and honest, transaction, for the benefit of trade, and necessary to the carrying it on: country-traders must have correspondents here. The agreement in *July*, was to indemnify the defendant for drafts he should pay; upon the faith of which he answered drafts, and the money paid on them was applied to satisfy other creditors; so here is a valuable consideration, and that, *bonâ fide*, paid. This is neither an absolute sale, nor is it according to mortgages in common cases, but by way of indemnity against any damage he might sustain, and therefore it was not necessary to appraise, or value, the goods,

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because he could not be entitled to more than a compensation for the damage he should incur: neither was he to have possession, till he was damnified; so that these things, which were badges of fraud in *Twyne's* case, are none here. The *quo animo* must be considered; and here was no intent to defraud.

Mr. *Morton*, on the same side, cited *Unwin v. Oliver*, P. 12 Geo. 2., before Lord Chancellor *Hardwicke*, from a manuscript note, taken by Mr. Justice *Bathurst*, and Mr. *Paul Jodrell*. *A.* being receiver, *B.* and *C.* were his sureties: after this, *A.* reciting, that he owed them so much on balance of account, and also reciting, that they joined in a recognizance for him as receiver, assigned several debts that were due to him to the said *B.* and *C.* to pay them the money due on the balance, and to indemnify them for being his sureties, &c. About a month after this, he became a bankrupt. Lord Chancellor held, the bill of sale ought to stand; and that being by way of indemnity to his sureties, it was for good consideration; and, in fact, by the principal's bankruptcy, they became answerable on the recognizance.

The C. J. observed, that this case was imperfectly stated (not shewing how it came before the court, whether on petition, or bill), and, therefore, was no authority, further than that it proved, that being surety for another, was a good consideration for a bill of sale to indemnify, &c., and that choses in action might be assigned for that purpose: but then they must (according to the opinion in *Ryall v. Rolle*), be delivered over to the bargainee as far as their nature allows; as for example, bonds must be delivered to him, and assigned. In cases of book-debts, notice must be given to the debtors. And he said, he did not know any case where it had been determined,

that a debtor's assigning all his effects generally to one creditor, in preference to all the rest, had been held good.

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Stands for the opinion of the court.

On the 7th of *February*, judgment was given, to the following effect, by

Lord *Mansfield*, C. J.

We are all of opinion, that the evidence I stated on the argument, may be resolved to the following case, *viz.*:

*James Davies*, an agent of *Demattos*, knowing that *Sclader* was in debt, and could not carry on trade without a person in *London* to draw upon, for that purpose negotiated an agreement, in *July*, 1756, between the bankrupt, and *Demattos*, that *Demattos*, should pay *Sclader's* drafts, on having a security. The nature, and terms, of which agreement, and security, appear by a deed, executed the 23d of *October*, which was procured by *Davies*, and *Whitehead* (another agent of *Demattos*), and witnessed by them, and one *Sills*, who was also agent to *D.*

In consequence of the agreement in *July*, the bankrupt, on the 8th of *October*, drew a bill on *Demattos*, by authority from him, for £200; which, in order to give it credit, was made payable to *Davies*, and indorsed by him.

On the 23d of *Oct.*, a like bill was drawn by *Sclader* on *Demattos*, payable to *Whitehead*, or order, and indorsed by him.

*Demattos* personally knew at this time, that the bankrupt's affairs were in confusion, and therefore hired *Sills*, and sent him into the country, to be the bankrupt's book-keeper, who having, by the 20th of *Oct.*, examined the bank-

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rupt's books, and made himself master of the then state of his affairs, on the 23d of *Oct.*, the deed in question was prepared, executed, and witnessed, as I before mentioned.

The deed was an indenture, between the bankrupt, of the one part, and *Demattos*, of the other part; and, after deducing *S.*'s title to the leasehold estate therein mentioned, and his right to redeem the same on payment of £1000, and interest, due by mortgage to *James Deane*; it goes on, "And whereas the said bankrupt, being concerned in, and carrying on, divers branches of merchandize, and having, on that account, frequent occasions to remit money to, and from, *London*, hath requested *Demattos* to be his agent for that purpose, to which *D.* hath consented; therefore, *in order to indemnify* him for so doing, the said *Sclader* hath agreed to assign the leasehold-premises, and also *all his stock*, used, and employed, in his trade of a brewer, maltster, cornfactor, miller, and mealman, to *D.*, his executors, administrators, and assigns. It was witnessed, next, that for the considerations aforesaid, and in consideration of 5*s.*, the bankrupt assigned the said leasehold premises, and also *all his stock*, utensils, and other things, used, employed, &c. in the said several trades, consisting of coppers, &c.: and also *all* that his changeable stock, consisting of debts, horses, carts, &c. and *all other goods*, commodities, &c. belonging to the said trades, or any of them; and all his right, title, &c.: *habendum* to *Demattos*, his executors, administrators, and assigns."

Proviso, that if *Sclader* should answer, pay, and make good, &c. all sums of money paid by *Demattos*, on any bills, drafts, &c. drawn by the bankrupt, and indemnify *D.* in respect, then the deed to be void.



Covenant, that if any breach should be made in the *proviso*, then, and from thenceforth, *Demattos* might peaceably enter into, and enjoy, and receive the rents of the leasehold-premises, during the term, and also have, and take, absolutely, to his own use, the premises last before assigned (*viz.* the stock, &c.): covenant for further, and more absolute, assurances.

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The bankrupt continued in possession of all the premises, after the execution of the deed; and *Davies* took occasion to tell the creditors, that the bankrupt would do well, for he had recommended him to two good men, whom he had secured by a mortgage of his leasehold-premises; but said nothing of the assignment of his general effects.

On the 11th of Nov., *Sclader* told *Davies*, and *Sills*, that he could not stand, and asked them what he should do: and, upon their advice, he, that day, gave possession of all his effects to *Davies*, as agent to *Demattos*, and *Davies* set out for London. On the next day, the bankrupt ordered *Sills* to deny him to his creditors; on the 13th, he was accordingly denied, and the reason given was, that it was in order to make an act of bankruptcy.

That, at the time of this act of bankruptcy, the bankrupt had no other property, or effects, of value, whatsoever, besides those which were comprised in the deed, and delivered up to *Davies*, as above.

After the 13th of Nov., *Demattos* paid the drafts indorsed by *Davies*, and *Whitehead*.

The jury were clear, *Sclader* was a bankrupt; but, as to the time when he became so, they submitted it to the

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opinion of the court, *viz.* whether the *postea* should be marked 23d of *Oct.* (when the deed was executed), or 13th of *Nov.*

It was truly said, upon the argument, that all the bankrupt-laws ought to be taken together, and considered as making one system of laws, to be expounded favourably for creditors, and to suppress frauds; and whether deeds are fair, or fraudulent, is, almost always, a question of law upon the facts.

A mortgage, by way of indemnity, we all agree, is a good consideration, as between the parties; but though it be a fair transaction as between them, yet it may be fraudulent against third persons, by *covin*, or *collusion*. As for instance: a purchasor in a registering county, forgets to register his deeds; *J. S.* knowing of these, (either personally, or by his agent), purchases the same estate for a full, valuable, consideration, and registers his deed: this is fraudulent against the first purchasor, and *J. S.* shall not take advantage of it.

A person knowing, that a debtor owes money upon a judgment, buys the goods for a valuable consideration, in order to prevent their falling into the hands of the judgment-creditor; this is a fraud against him.

So where an executor is known to be wasting his testator's assets, and a person buys them fraudulently, though at a full price, in order better to enable the executor to defraud the creditors, he will be answerable for them.

So is the case of marriage-brochage-bonds, founded on secret contracts, and all other cases where third persons

may be injured consequentially: but I have instanced only in such as have been solemnly determined.

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In *Twyne's* case (though that was a criminal prosecution), a transaction of this sort was held fraudulent.

As to all the premises contained in this deed (except the leasehold), it could not have the effect of a conveyance, as, by the express terms of the deed, the bankrupt was to continue in possession, and act as owner.

The creditors trusted to the bankrupt's visible stock, and to the bankrupt-laws, by which he could not mortgage, or sell, them, to prevent an equal distribution amongst his creditors, in case he should fail; therefore they were imposed upon, and deceived, by fictitious circumstances, and secret transactions, and by *Demattos'* own agents: for, to deceive more, the bills were payable to, and indorsed by *Davies* and *Whitehead*: *Davies* declared he would do well, &c.; and mentioned the mortgage of the leasehold-premises, but suppressed the other part of the security, which included the stock.

The trust put in *Sclader* was, that, when he could stand no longer, he should give possession to *Davies*, and commit an act of bankruptcy.

From the nature of the fund, possession could not be intended to be taken, till immediately before an act of bankruptcy was committed, for, when he was stripped of all his stock in trade, &c., a bankruptcy must necessarily be the immediate consequence.

*Sills* was placed to watch over him: when he could stand no longer, he, agreeably to the confidence reposed

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in him, gave notice to *Whitehead*, and *Davies*, and they took possession for *Demattos*. This shews plainly, that all parties were aware, that possession was necessary; and their intent was to evade the statute of 21 Jac. 1. c. 19. : for that measure of the delivery of possession, was instantly taken, without any other advice.

Let us then consider the case in two great views.

1. In respect of the end designed by this deed.
2. In respect of the means for attaining that end.

1. The end proposed was, that, in case *Sclader* became a bankrupt, his *whole* estate should be vested in *Demattos*, to secure his whole demand. The preference aimed at, is fraudulent, and unlawful, as against the other creditors. If, after the conference between *Sclader*, and *Davies*, and *Whitehead*, on the 11th of *November*, the deed had been executed, when *Sclader* was determined to commit an act of bankruptcy (and that is as fair a light as it can be put in), still it would have been fraudulent, and unlawful, and an act of bankruptcy. Such preference would be a fraud upon the whole bankrupt-laws, and defeat the two main ends of them : which are,

1st. The right the creditors have to the management, and disposal, of the bankrupt's estate, and effects.

2dly. An equal distribution amongst them.

1st. The creditors have a right (under the direction of the commissioners, and control of the great seal), to choose assignees for managing the estate : but, when such a deed as this is made, of *all* his estate, to a favourite, and,

therefore, friendly, creditor, this privilege is taken from the other creditors, and even the books, and papers, are kept from them.

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2dly. The equal distribution of his effects was directed by 21 Jac. 1. c. 19., and has been anxiously provided for by all the succeeding statutes, seeing the great mischief that would arise to trade, if priority, and secret liens, were allowed amongst the creditors of the bankrupt, whose situation is widely different from that of persons who are not traders, nor subject to the bankrupt-laws. To this end, therefore, creditors by judgment, statute, recognizance, bond, or other specialty, or attachment by the custom, unless execution be actually executed, are put exactly on the same footing with other common creditors, as all equally trust his personal credit, and confide in that, and not their other securities, seeing, they do not proceed to carry them into execution.

The conveyance of any personal chattels of a trader, by way of security, and yet leaving the possession in him, falls exactly within the same reason. Land, indeed, may be held by the mortgagee, by virtue of the title, though the mortgagor continues in possession; but it cannot be so of personal chattels, for the possessor must be the visible owner,

Suppose, just before, and in contemplation of an intended bankruptcy, such a deed, of *all* his effects, was made, and possession instantly delivered, this would still be an undue preference, and must be unjust, if not corrupt. Nay, if on trust to pay all his creditors, except one, equally, this would be as bad, as was lately determined by Lord *Hardwicke*, in a matter which came on before him at *Lincoln's Inn* hall, the 31st of July, 1755,

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*ex parte Gayner*, a bankrupt. The case was thus: *Gayner*, a merchant at *Bristol*, had a parcel of ginger consigned to him from a correspondent abroad, to the value of £2500. He, being in declining circumstances, insisted, it was not sent by his orders, and that he would not receive it otherwise than as a factor; but, after a litigation, he was obliged to accept it on his own account. After this, on the 7th of *June*, 1755, he executed two assignments of his effects to some of his creditors, as trustees for themselves, and his other creditors. The first deed was of *all his effects* (except household-goods, watches, plate, bills of exchange, inland bills, promissory notes, and cash then by him), and was, in trust, to pay, and distribute, the produce equally among all his creditors, except *Ford* (the person who had litigated the matter with him about the ginger). This deed, however, was immediately cancelled, the trustees declining to act under it; whereupon the second assignment was made to other trustees, who undertook it; and, in the interim, the makers of the first deed considering, that a conveyance of all his effects might be too much, and thinking, that the exception did not go far enough in the other deed, they now except the ginger; and likewise considering, that the excepting *Ford* by name would have a fraudulent aspect, they now made the trust for payment of the several creditors named in a schedule (which, in fact, were all the creditors except *Ford*). On the 9th of *June*, *Gayner* committed an act of bankruptcy, by denying himself. *Ford* insisted, he alone had a right to the assigneeship, as all the other creditors had come in under the deed; however, the others voted in the choice of assignees, whereupon *Ford* petitioned, &c. Lord *Hardwicke* was clear, that this preference of all the other creditors, in exclusion of *Ford*, and done in contemplation of an intended bankruptcy, was, itself, an act of bankruptcy; and, therefore, unless they would sign their con-

sent in the secretary's book, to deliver up the deed as fraudulent, he ordered, *Ford* should have the sole choice of assignees; which was all he could do, as they had a right to have it tried at law, whether this deed was fraudulent, or not: however, all the counsel concerned were so clear, that they did not ask for a trial at law; but the deed was given up, and all the creditors came in under the commission.

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It is observable here, that the framers of that deed seemed to have taken it for granted, that a conveyance of *all* his effects would have been within the statute, and, therefore, they colourably excepted certain parts; but that contrivance did not prevail so far as to admit of an argument.

There is a great difference between conveyances of all, and of part only; the latter may be public, fair, and honest; and, if done fairly, and immediately carried into execution, may be good. And as the party may sell, so may he transfer part by way of indemnity; but a conveyance of all must be either fraudulent, and with a secret trust, and leaving the vendor in possession, or an immediate bankruptcy must ensue.

It has been strongly insisted, upon the argument, that a trader may, in contemplation of an act of bankruptcy, convey *part* of his effects to a just creditor, to give him a preference. This point is not necessary to be determined in the present case, as here is a conveyance of *all*: but I cannot help taking notice, that I know of no such proposition yet established, much less in the extent in which it was laid down.

The cases relied on were, 1. *Cock v. Goodfellow*. 2.

1758. *Jacob v. Shepherd.* 3. *Small v. Oudley.* 4. *Unwin v. Oliver.*  
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In *Cock v. Goodfellow*, which is well reported in *Lucas*, the fact gave rise to no question, as Mrs. *Cock* was solvent at the time.

*Jacob v. Shepherd*, is not truly stated any where in print. It was as follows :

*Lee*, the bankrupt, a *Turkey* merchant, executed a deed, on the 8th of *June*, 1709, thereby conveying certain particular goods, then in the hands of his factor, *William Snell*, in trust to apply the same in satisfaction of a debt of £1500 due to himself, then a debt of £1551 to *George Morley*, and, out of the residue, to pay such of the creditors as the said *Lee*, by consent of *Morley*, should name ; and, if any surplus should remain, after *Snell*, and *Morley*, and the creditors for whose debts they were bail for the bankrupt, should be discharged, to pay it to the bankrupt. On the 16th of *December*, and 20th of *January*, he directed the trustees to pay particular debts.

On the 11th of *February*, he became a bankrupt. The trusts of the deed of *June*, 1709, were openly carried into execution, as soon as the deed was made, so that no question did, or could, arise, in that case, on this clause of §1 *Jac.* 1. But a bill was brought by the assignees, that the trustees might account with them : and it was founded on two suggestions : 1st. That the deed was a fraud on the bankrupt, in tying up the payment to such creditors as *Morley* should name. 2dly. As an imposition on the other creditors, and a fraud on the bankrupt-laws.

On the 16th of *June*, 1725, the cause coming on to be



heard before Sir *Joseph Jekyll*, he took time to consider of it, and ordered all the pleadings, and deeds, to be left with him in the mean while; and at length, *viz.* in *December* following, delivered his opinion.

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1st. He was of opinion, there was no fraud on the bankrupt himself, as the parties were fair creditors; and as *Lee* could not set aside the deed on that ground, neither could his creditors, who stood in his place in that respect. But,

2dly. On the second ground, he was of opinion with the plaintiffs. He declared the deed to be fraudulent, and an imposition on the general creditors; and thought it so strong a case, that he ordered it to be set aside, with costs, to be paid by the creditors claiming under it.

In this determination he was right as to the justice of the case, but mistaken as to the manner of relieving the creditors; for there is no such thing as a deed fraudulent in Chancery in cases of bankrupts; but, if such circumstances attend it as would make it fraudulent in other cases, it is, *ipso facto*, an act of bankruptcy.

On an appeal, therefore, to Lord Chancellor *King*, on the 6th of *August*, 1726, he took the distinction I have mentioned, that the deed might be fraudulent, but that the court of Chancery could not decree it fraudulent, but it must be void at law; and accordingly he directed an issue to try, whether the execution of the deed of the 8th of *June*, 1709, was an act of bankruptcy, or not; and the jury finding, that it was not, but that he became a bankrupt on the 11th of *February*, Lord *King* established the deed.

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It is observable that Sir *Joseph Jekyll* was so struck with the appearance of fraud on the face of this deed, that he ordered it to be delivered up; and Lord *King's* establishing it afterwards was only in consequence of the jury's finding it not to be fraudulent; and they might have many reasons to induce them to it; but the evidence not being preserved in any part of the proceedings, cannot now be got at. It was an agreement only as to part of his effects, and that immediately, and openly, carried into execution. It does not appear, that he then thought of a bankruptcy; on the contrary, one ground for relief was a fraud upon him; and it is probable, he might be frightened into it by their threatening to sue him.

The case of *Small v. Oudley* happened very soon afterwards; it is best reported in 2 *P. Wms.* 427, though nowhere perfectly. It came on before Sir *Joseph Jekyll*, 4th of *Dec.*, 1727, and was as follows:

*Small*, the plaintiff, on *Sept.* 21st, 1720, to accommodate *J.* and *D. Norcourt*, goldsmiths, and partners, with a sum of money, for which they were then much pressed, transferred to them £500 South Sea-stock (which they afterwards sold for £1800), and they agreed to replace the stock in a week, or ten days, at the farthest; but, declining in their circumstances, they, on *Sept.* 29th, assigned to the plaintiff all their interest in the wine-trade (worth about £300). Whether this was an act of bankruptcy, or not, he (according to Lord *King's* determination in the former case) sent to be tried at law; and at last decreed in favour of the deed (in consequence of the verdict), though strongly against his own opinion, as appears from his reasons, reported in *P. Wms.*; yet this was a fraud on *Small*, not on the creditors; and the £1800 of his

money went in payment to the creditors, and all he got for it was a security, worth about £300.

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The 4th case, viz., *Unwin v. Oliver*, is not entered in the secretary's book (which is what often happens): however, I have a fuller note of it than that cited at the bar.

That was an assignment of certain debts specified in a schedule, in trust, to indemnify his sureties. And there the bankruptcy, which was set up, did not happen till a month after the deed. So no question arose on this clause of 21 Jac. 1.; and possession, as far as the nature of the thing would admit, being delivered, agreeably to the resolution in *Ryall v. Rolle*; and there being no suggestion, that it was made in prospect of an immediate bankruptcy; Lord *Hardwicke* held, that indemnity was a good consideration, and that the deed ought to be established, unless the parties could impeach it at law.

2. But, 2dly, supposing, for argument's sake, that a man may immediately before a bankruptcy, legally and properly assign over all his effects, in order to give a preference to some of his creditors, yet, in this case, the means used are fraudulent: By his continuing in possession, a false credit was given to the bankrupt. The second argument of fraud in *Twyne's* case was, that he continued to keep them as his own.

There were three cases cited, upon the argument, to shew, that the mortgagor's keeping possession would not infer fraud, as the vendor's, in an absolute sale, would.

1st. *Meggot v. Mills*, 1 Lord *Raym.* 286, which proves the direct contrary. And *Holt* said, had it been to any

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other creditor, it had been bad, but there he was considered as landlord, or original owner, and as letting the goods with the house.

2d. Is in Prec. in Chan. 285.; but that was not the case of a bankruptcy, and is distinguished by the Lord Chancellor from the case of a bankruptcy; which makes an end of it.

1 Atk. 165.

3d. Was the case of *Ryall v. Rolle*: but there the act of bankruptcy relied on was long subsequent to the mortgages, and the assignees did not care to carry the bankruptcy back so far; but, if they had, the presumption of fraud would have been disproved in that case. The same things had been mortgaged six times over, and each time for as much as the whole were worth. There the parties relied on their security as a mortgage, considering it in the light of mortgages of real securities: they left the goods in the mortgagor's hands till after the bankruptcy, so that they mistook the law, but did not offer to evade it. But here, the parties knew the law; and that, agreeably to that case, possession of personal chattels was necessary, whether it was a mortgage, or an absolute sale of them.

Two general objections have been taken to this way of determining, for the inconvenience that will arise to trade.

1. That it will confine trade, if persons may not secure their creditors by a mortgage of part of their stock, without giving up the possession.

(Answer.) It has been the policy of all the bankrupt laws, since 21 Jac. 1., to level all the creditors who have not got such a pledge in their possession as cannot be

taken from them, and not to suffer a few, under a secret, fraudulent, lien on the effects, of which the bankrupt was the visible owner, to swallow up all, which would certainly be a greater damp upon trade. If goods are actually, and openly, delivered to one creditor in preference, there is no injury done, because none are injured by a false credit; and his creditors trust him to sell.

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Upon mortgages of real estates, the title-deeds being in the hands of the mortgagee, protect him, and hinder the mortgagor from imposing upon others: but, in the case of personal chattels, they may be mortgaged a hundred times over; which, if allowed, would be a plentiful source of fraud.

2d objection. That it will in itself be an act of bankruptcy, which can never be purged, according to the rule, once a bankrupt, and always a bankrupt.

(Answer.) I am sorry that phrase has crept into use. Every equivocal fact may be explained by circumstances. If a man is denied to his creditors, it may be on occasion of illness: he may leave his house, and yet with such circumstances as shew, he did not design to abscond.

And of all equivocal facts, those upon deeds are the most open to such an explanation, for hardly any deed is fraudulent on the face of it. The use to which they are applied, shew, *quo animo* they were made; therefore, if a good consideration is proved, they may be good, otherwise not: if possession is delivered, they are good, if not, they are bad. And in *Ryall v. Rolle*, the letting the bankrupt continue in possession after the bankruptcy, was evidence, that they had no fraudulent intent. But, in the present case, the delivering possession just before the

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positive act of bankruptcy, shews, the precise view of the parties was to avoid 21 Jac. 1. This must have been in contemplation all along, otherwise there could have been no pretence for taking possession on the 11th of *November*, any more than at another time. This proves, *quo animo* it was done. No default had been then made, for *Demattos* had paid nothing.

Upon the whole, therefore, under all the circumstances of this case, we are, unanimously, of opinion, that this conveyance of his *whole* substance, though by way of security, and indemnity, only, and for a valuable consideration, is in itself an act of bankruptcy, and that the *postea* ought to be marked, that he became a bankrupt on the 23d of *October*.

A case happened before me at *Guildhall*, in the bankruptcy of one *Mackrill*, before a special jury. When the matter was over, the foreman of that jury said, he hoped such a deed as this, executed in favour of one creditor, would be held an act of bankruptcy, as otherwise every honest creditor was in the power of the bankrupt.

This is no argument at law, but satisfies me, I am right in judging of the convenience.

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ROE (Lessee of WILKINSON) agt. TRANTMER,  
and Others.—C. B.

THIS was an ejectment, and, the cause being tried at York assizes, a verdict was found for the plaintiff, subject to the opinion of this court, upon the following case: viz.

*Thomas Kirby*, being seised in fee of the estate in question, by lease and release, bearing date respectively the 9th, and 10th, of *November*, 1733: the lease made between the said *Tho. K.*, of the one part, and *Christopher*, his brother, of the other, being a lease for a year of the premises therein mentioned to the said *Christopher Kirby*, to the intent, that, by virtue thereof, and by force of the statute of uses, the lessee might be enabled to take a release of the reversion thereof, to such uses, &c. as therein should be mentioned.

A deed by which it is intended to convey an estate to a near relative, &c., after the grantor's death; though void at common law, yet enures, under the statute, as a covenant to stand seised to uses.  
2 Wils. 75.  
S. C. *Willes*,  
S. C.

The release was made between the same parties: the releasor, in consideration of natural love, &c. and of £100 paid by *C. K.*, grants, releases, and confirms to *C. K.*, after the death of him, the said *Thomas Kirby*, the releasor, the premises, and all his estate, &c. to hold to the said *Christopher Kirby*, and the heirs of his body, remainder to *John Wilkinson*, junior, the lessor of the plaintiff, by the description of "eldest son of my well beloved uncle *J. W.*," his heirs, and assigns, for ever, to the only proper use, &c. of him, his executors, administrators, and assigns: subject to the payment of £200 to *J. B.* by *J. W.*

The said deed contained a covenant from *Thomas*

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*Kirby* for quiet enjoyment; and a declaration, that all conveyances, &c. should enure to the use of that deed.

In 1744, *Thomas Kirby* died, seised; *Christopher Kirby* entered, and was possessed, and died, without issue, in 1750. *John Wilkinson*, the lessor of the plaintiff, is the remainder-man.

This case was argued, in *Trinity* Term last, by Serjt. *Hewitt*, for the plaintiff, and Serjt. *Prime*, for the defendant, to the following effect.

Serjt. *Hewitt*, for the plaintiff.

The general question is, whether *J. W.* is, by virtue of the deeds mentioned in the case, entitled to an estate sufficient to recover in this ejectment?

The conveyance, I must admit, is very inaccurately penned; but the law is disposed to give every deed some operation, though absurd in the framing, *ut res magis valeat*.

If the grantee is named in the *habendum*, it is sufficient. *Shep. Touchs.* 75.

The same writer, in fol. 82, lays down this rule: that a deed made to one purpose, if it cannot take effect the way it was intended, may enure some other way: where the intent is apparent to pass it one way or another, it may pass either way.

In fol. 83, he says: if a deed may enure divers ways, the grantee may take it either way. Another rule laid down is, that a construction shall be made on the entire deed.



Having premised this, I will now consider the objections to this deed, which are reducible to three.

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1. That it is not good, at common law.

2. That it cannot be taken to pass any thing, by the statute of uses.

3. That if it can be good to some purposes, by that statute, yet it cannot pass any estate to *J. W.*

I shall not trouble the court, as to the first, as it will be too much for me to maintain it as a common law-conveyance; and the court have, already, so fully declared their sentiments against me on that point.

I shall, therefore, proceed to the two last objections: take them up together, and endeavour to shew,

1st, That it may operate as a deed to pass an estate, by the statute of uses, by way of covenant to stand seised.

2dly, I shall offer answers to the objections that have been made.

1. The law aims at answering men's intentions in their deeds, if no intent contrary to law appears. The rules I have mentioned, sufficiently evince this.

I will add another rule, which, I hope, is also law, viz.

If a conveyance is made, wherein an intent does not appear negatively, that it shall *not pass* by the statute, it shall have that effect, rather than be a nullity.

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Though the law was formerly held otherwise, yet now that rule is relaxed, as will appear by an authority I shall mention by and by.

Deeds of uses are equitable conveyances, and have received a liberal construction. *Shelley's case*, 1 Co. 100, 101. *Fox's case*, 8 Co. Poph. 48. 2 Lev. 9. 1 Mod. 175. S. C. 2 Ro. Abr. 786, 7. 3 Leon. 16. (1 Vern. 141.) These cases shew, that the rule, in Co. Lit. 49, a., that common law-conveyances shall not operate as deeds of uses, is not now law; and to the same purpose is Poll. 523. *Saunders v. Savil*, cited in 3 Lev. 372.

To this have been objected several authorities. Co. Lit. 49. a. 2 Vent. 318. March. 50. 1 Sid. 25.

The 1st I have already mentioned.

As to 2 Vent. 318., and 1 Sid. 25.: in both those cases, the estate was to arise out of the estate of others; but here it is not limited to *another person, to the use of J. W.*, his heirs, and assigns, but to him. Had it been to *Christopher Kirby*, and his heirs, to the use of *J. W.*, his heirs, and assigns, it had been very different; but no estate is in *C. K.*, to serve the estate to *J. W.*, his heirs, and assigns.

The words, to the use of *his executors, &c.* are void, as it is an estate of freehold; and then, upon the other words, it would be, at least, an estate for life, which is sufficient to recover in this action.

In the case of *Hore v. Dix*, 1 Sid. 26., one reason was, because the deed was to strangers.

As to the case in *Mar.*, 50., it is there said, a man may covenant to stand seised to the use of his son, after his death.

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That case is taken notice of in *Poll.* 529., where it is said, the reporter believed, that case was not determined on much debate.

2 *Ro. Abr.* 789. pl. 2. in the same case, it is said, the estate shall pass, if the intention of the parties appears: so that the authority of the case in *March*, as applicable to the case at bar, is gone.

2. I come now to my other head, which is, to answer the objections made by the other side.

1st objection: that *J. W.* is not a party to the deed.

That is answered by considering it as a deed of covenant to stand seised, for that may be by deed-poll.

2d objection: that there is no consideration as to *J. W.*: the consideration of natural affection, and the money paid, being from *Christopher Kirby*.

This objection, at first, seemed of weight; but, in answer to it, *J. W.* is named in the deed to be of the blood of the covenantor: indeed, if it had not been so mentioned, he might have averred it. *Mildmay's case*, 1 *Co.* 176. 7 *Co.* 40. & 41. 2 *Str.* 934. But here he is named to be of the blood, and that is a sufficient consideration to raise an use in him.

3d objection: that the release to *Christopher Kirby* is without any words of inheritance in the premises, or

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granting part, for the estate in the *habendum* to arise out of.

This objection is also answered, by considering the estate of *J. W.* as derived out of the estate of the grantor; and, in a covenant to stand seised, the estate remains in the covenantor.

4th objection: that this is bad, as a limitation *in futuro*.

This is answered, too, by taking it as a covenant to stand seised; for a man may covenant to stand seised to the use of another after his own death, and so is the case of *March*, 50. But other cases shew this more fully. 3 *Lev.* 371. *Poll.* 529. 1 *Vent.* 379. *Pybus v. Mitford*, 1 *Mod.* 98.

5th objection: the limitation being to *the executors*, &c. was objected to.

Still we have an estate for life, and that is enough for us.

6th objection: it was said, there was no particular estate to support this remainder, and for that was cited *Carth.* 262.

But, I submit, the deed is good, as a covenant to stand seised; and has all the five qualities of such deed.

Serjt. *Prime*, for the defendants.

The intent of the parties should not only appear, but must be conceived in apt, and proper, words; and that rule holds even in the case of wills, where less nicety is

required. The case from 2 *Str.* 934., manifestly tends to shew this. The intent of the parties was there plain, that the wife should have a fee-simple, for a person must have power to convey, before she can do it; yet, notwithstanding this clear intent, the court held that limitation inconsistent with the consideration: improper as a covenant to stand seised, and so void.

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I admit, it is there said, a relation may aver his being of the blood, &c., and that I shall not dispute.

Much has been said of the releasor's intent of raising an use for *J. W.*: no such intention appears. I own, it appears, he intended to pass it another way.

If he had intended to pass it as a covenant to stand seised, the lease had been idle. No kind of conveyance could more clearly shew the intent of the parties, that it was not to pass as a covenant to stand seised. It was their intention, that *C. K.* should, by the lease, *be in actual possession*: both he and *T. K.* could not be possessed at the same time; consequently, he could not stand seised. It was their intention, that there should be a transmutation of possession.

My brother says, the intent is the primary consideration, and the mode of conveyance only secondary. This doctrine would set things at sea, and any man might be a conveyancer: a wheelwright, as well as *Mr. Pigot*.

The way of expressing the consideration here, is not in the way of a covenant to stand seised. The love and affection, is thrown in only by the bye. The £100 was the real consideration, and that is not proper for raising uses, by way of covenant to stand seised.

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The nature of this conveyance (being intended by way of transmutation), clashes with any notion of a covenant to stand seised.

I shall not make any objection, as to the words *executors, &c.*: but there follows another thing, inconsistent with a covenant to stand seised to uses; for the present lessor of the plaintiff is to pay £200 consideration, which is not the proper consideration for that kind of conveyance. *Pell v. Brown.*

But, not to rely on one or two expressions:

There follows a covenant for quiet enjoyment, which seldom occurs in covenants to stand seised; because such conveyance is a voluntary grant, and there is no occasion for the covenantor to warrant the title of that which he gives of his bounty: in that covenant, too, it is expressed, that they are to enjoy *after the death of Thomas Kirby*, the conveyor; so that it is consistent with the former part of the deed, and shews the settled intent of the parties.

It has been said, the authority of 1 *Inst.* 49. *a.* has been shaken. I have, upon this occasion, looked into Mr. *Sheph.* whose authority is now opposed to that of my Lord *Coke*; and I find, that he constantly cites *Coke*, to warrant what he says, and seems not to differ from him. He nowhere says, that an estate shall pass in a way contrary to the manifest intent of the parties: but, that their main intention shall rule the construction *in toto*.

I take it to be laid down generally in all the books, that where there is a plain intention of the parties, that the estate shall pass by transmutation of possession, it shall not pass by way of covenant to stand seised. And also,

that a grant, &c. after the death of the conveyer, is a void deed. 2 Co. 55. 1 Inst. 48. b. 49. a. *Cro. Elix.* 254. 2 Ro. Abr. 788. g. *March*, 50. S. C. Mr. *Polluxfen* does not assert any thing against the authority of that case; he only says, in his argument, he *believed*, &c. that case was then encountering what he had to maintain; and what a counsel says, *arguendo*, at the bar, for his client, can hardly overthrow the authority of a determined case.

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As to 2 *Vent.* 318.: though the ceremony which was not wanted in that case is not now necessary, yet the case is an authority.

If the intention of the parties was the only thing necessary, there might be an averment of the uses of a fine, contrary to the deed declaring them; but the contrary to that has been determined, 4 *Mod.* 153. *Show. Parl. Ca.* 104.

In *Cro. Elix.* 254., the intent being inconsistent with the rules of law, was held not good.

In cases of copyholds, it has been held, that a surrender, *habendum in futuro*, is void.

To support this general position, I shall cite a few cases. *Cro. Elix.* 29. *Cro. Jac.* 376. *Bulst.* 272, 273. 1 *Ro. Rep.* 109. 137. 253. *Godb.* 264. 2 *Ro. Abr.* 477. pl. 3. 4 *Leon.* 8. 1 *Ro. Abr.* 828. 2 Co. 55., and *Chudleigh's case*, 1 Co.

This, then, is either a void conveyance, or must have effect as a covenant to stand seised.

In covenants to stand seised, the covenantor should,

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out of his *own estate*, raise those uses; therefore, if that had been the intention of the parties here, the conveyancer would not have departed with the estate out of the releasor. To say, that *Thomas Kirby* meant it by way of covenant, is contradictory to what he has said, under his hand and seal.

After a man has conveyed away an estate, it is sometimes, in practice, said to be an intent; but, if I convey an estate to *A.*, I cannot covenant, that he shall stand seised to uses. The intention can only be inferred from the act; and, here, the act does, in terms, contradict the supposed intent.

*Reply.*

The intent, my brother says, must be apparent. I say, the intent is here clear, that *Thomas Kirby* intended to convey, some way or other; and the law, I hope, will let that intent take effect, as the estates meant to be raised are agreeable to the policy of the law. The case of *Goodtitle v. Petto, Str.* proves, that if a deed can operate any way, it shall.

My brother says, it was intended to pass by transmutation: no stress is to be laid upon that; but, if it can pass any way, it shall; for the law wishes to make the alienations of estates as free, and easy, as possible.

It is said, the consideration of money is inconsistent with what we contend for: but there is, besides that, another consideration, that of blood, which will answer our purpose; moreover, the payment of the £200 is only a condition annexed, and that may be to a covenant to stand seised.



My brother says, uses cannot arise by way of covenant, when the covenantor has no estate in him: but here, nothing passes at all out of him, unless by covenant to stand seised.

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As to the covenant for quiet enjoyment: I do not regard what way the party intended to convey. He certainly did intend to convey one way or another, and that is enough for me.

The covenant, too, is pretty peculiar; it is, that he shall enjoy after the death of the testator.

As to *Cro. Eliz.* 254.: the conveyance there was a complete conveyance, and not a nullity, as this is (considering it as a release): and the same answer occurs to many other of the cases my brother has mentioned.

As to *Davies v. Speed*, in *Show. Parl. Cases*, 104., the same case is also reported in *Carth.* 262.: but my brother declined citing it from that book, because what my Lord C. J. *Holt* there says, makes for me; for it is there laid down (as is clearly law), that there needs be no estate to support a future estate that enures by way of covenant to stand seised.

In *Bedell's* case, it is said, that calling a man his cousin, is sufficient consideration to raise an use in the manner we contend.

After this argument, the case stood over till this term, when the opinion of the court was given: *absente*, *Bathurst*, J.

*Willes*, C. J.

The question is, whether the deed of the 10th of *Nov.*

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1733, can operate as a covenant to stand seised, for it is void as a release, being to commence *in futuro*?

Many cases were cited on the arguments, all of which were not consistent.

This case depends on the general reason of the law, and, therefore, I shall consider it on that.

We are all of opinion (and so is my brother *Bathurst*, who, though he is absent, has authorized me to declare his opinion), that this deed may operate, as a covenant to stand seised.

We, first, found our opinions on the general rules of law, for construction of deeds, as they are laid down in *Sheph.* on common assurances, 82, 83, where what he says is not so much his own opinion, as that of other great men, particularly Lord *Coke*; and many instances are there put.

In *Hob.* 277. it is said, that judges should be astute to invent reasons, and means, to make acts, according to the just intent of the parties, &c.; and, in *Crossing v. Scudamore*, Lord *Hale* declares himself of the same opinion.

These are our general reasons.

Can this then operate, as a covenant to stand seised? To that there are five essentials.

1. That it be by deed.
2. That there be sufficient words for a covenant.
3. The covenantor must be seised.

4. The intent must be plain.

5. There must be a proper consideration, to raise an use.

Here all these concur.

1. It is by deed.

2. The word *grant* is sufficient for a covenant.

3. *Thomas Kirby* was seised.

4. The intent was plain, that *J. W.* should have the estate.

5. There is, plainly, a good consideration: for the grantee is called "son of my uncle." If it had not been so said in the deed, still it might be averred. *Goodtitle v. Petto*, 2 *Str.*

I shall now mention some cases, modern ones I mean, for, as to the ancient ones, they are not conclusive, as the courts have gone further of late.

*Crossing v. Scudamore*, 1 *Mod.* 475. 2 *Lev.* 9. 1 *Vent.* 137. *Walker v. Hall*, 2 *Lev.* 213. In that case, *Co. Lit.* 49. *a.* was relied on, but not regarded.

*Sir Thomas Jones*, 105.

*Harrison v. Austin*, *Carth.* 38, 39: though the cause was agreed, yet the opinion of the court appears.

3 *Lev.* 307. *Osman v. Sheaf*. The opinion of the judges is there declared to be the same.

These are all the authorities I shall mention; and these are sufficient to warrant our judgment.

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Several objections have been made, on the part of the defendant.

1. That the lessor of the plaintiff is no party to the deed.

There is no necessity for it, in a deed of covenant to stand seised; and remainder men always take so.

2. That there is no proper consideration, as to *Wilkinson*.

That is not so, as I have before mentioned.

3. That this being intended as a deed at common law, shall not operate as a conveyance by the statute: and this is founded on *Co. Lit.* 49. a.

This rule is not now adhered to. Even in Lord *Coke's* time, it does not appear to have been generally so; he says, "in many cases," &c. But, in *Sheph.'s* time, they were more liberal.

The notion as to how the party intended it should pass, has little in it. His intention was only, what estate should pass, and to whom. As to the manner, not one settler out of an hundred thinks of that.

4. That the deed is void, and cannot operate at all.

If, by that, is meant, that it is void as a grant, I admit it; but, still, it is a deed, and may, by the cases I have mentioned, operate as a covenant to stand seised.

5. The main objection is, that no estate passed to *Christopher Kirby*, out of whose estate, it is said, the others are to arise.

To support this, three cases were cited; one old authority, and two of more modern date. The first was from *Cro. Eliz.* 856., but that is not very applicable. The others, I own, go a good way; they are *Hore v. Dix*, 1 *Sid.* 25., and *Sammon v. Jones*, 2 *Vent.* 318, 319: that is, I own, subsequent to the cases I have cited, and they were considered, so to be esteemed of great weight. But, as it is stated, I do not understand it; it is said to be parallel to *Hore v. Dix*; but the report does not seem so, and, therefore, I suppose, it is wrong.

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If those cases were *res integræ*, I should be of another opinion. The estates might arise out of the grantors'.

But, as my poor opinion is but of small weight, I shall choose to distinguish the cases, rather than contradict such great authorities.

*Wilkinson's* estate could not, here, arise, nor was it intended to arise, out of *Christopher Kirby's*, as the latter was not intended to take more than an estate-tail, at the most; therefore, his estate must be determined, before *John Wilkinson's* came into possession.

This case is still stronger than those that have been mentioned; for here is not only the word *grant*, but the grantor expressly covenants the estate shall go, &c. in two places.

We are, therefore, unanimous, that *Wilkinson* should have the benefit of the verdict, and judgment must be entered accordingly.

See *Gillb. Reps.* 171.

GODIN, *and others*, agt. LONDON EXCHANGE  
ASSURANCE COMPANY.—K. B.

An insurance made by a consignee, after a former one had been effected on the same property, by a party having a *lien* on that policy, for the balance of his accounts, is not double, and entitles such latter insurer to the full benefit of his contract.

1 *Burr.* 489.

1 *Bl.* 103.

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*Park*, on

*Ins.* 283.

THIS was an action brought on a policy of insurance, and, on the trial, a verdict was given for the plaintiffs, for the whole sum, subject to the opinion of the court.

The cause having been argued, by Sir *Richd. Lloyd*, and others, for the plaintiffs, and Mr. *Norton*, and others, for the defendants; the opinion of the court was delivered, as follows, by

Lord *Mansfield*, C. J.

*Meybohm*, a *Russia* merchant, opened a correspondence with *Amyand*, and Co., merchants in *London*. *A.* and Co. sent ships from *London*, which brought goods back from *Meybohm*, who became much indebted to *Amyand*, on the balance of accounts.

On the 21st of *August*, 1756, *Amyand* got a policy underwrote, insuring the ship, on the loss whereof the present question arises, and the goods, which then were, or should be, put on board, at and from *London*, to *St. Petersburg*, and, at and from thence, back to *London*. By the 28th of *September*, 1756, *Amyand* had insured on that policy, by different underwriters, at different times, to the amount of £1900: £1100 thereof, on the ship, and goods, “as shall be expressed,” and £800 on goods from *Petersburgh*.

*Meybohm* wrote a letter to *Amyand*, and Co. from *Petersburgh*, on the 7th of *September*, 1756, and tells him,

he shall get several parcels of goods, as per invoice, and desires him to get them insured. He, also, in the same letter, tells *A.*, that he had sent him, in the said ship, a quantity of iron, which he had bought for him, and which he should take the liberty to draw for.

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This letter was received by *Amyand* sometime before the 28th of *October*: that, and the two following days, *A.* insured £900 more, on goods in the ship, at and from the *Sound*, to *London*.

This was all the insurance made by *Amyand*.

About a fortnight after these letters came to *A.*, *Mey-bohm* indorsed the bills of lading, for value received, to *Tamesz*, of *Petersburgh*, who sent a letter to his correspondent in *London*, to get the cargo insured. *Tamesz*'s correspondent received that letter upon the 15th of *November*, and therein *Tamesz* says, he believes, there had been a former consignment and insurance, but desires his correspondent to insure the whole, that he may be safe at all adventures. Upon receipt of this letter, the correspondent applies to the defendants, and tells them, he believes there had been a former consignment, and insurance, but both parties desired to be safe; and, thereupon, they made the policy, on which this action is brought, which is, at and from the *Sound*, to *London*.

The ship, and goods, were destroyed by fire, in the voyage homeward.

This being the case, the question is, whether the plaintiffs ought to recover on this policy, and to what amount? The defendants insist, that they ought not to recover the whole value insured, but admit, they must recover half.

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Where the insured has paid, and the insurer received a premium for the whole, the justice of the case, as between the parties, is, that he should make good the full loss. But, say the defendants, by the mercantile laws, these policies are considered as an indemnity in case of loss: and, in order to check frauds, that it may not be the interest of the party insured to sink the ship, he shall only recover the single value, in the whole. This was so, before gaming policies were introduced.

I do not find, that there is any *dictum*, by any of the writers on the mercantile laws, nor any case that goes further, than that the insured shall recover only one satisfaction for his loss.

The general principle, then, standing as I have said, the defendants must shew, that the plaintiffs are recovering a double satisfaction; and, for that purpose, they insist, that if *Tamesz* did not insure the whole, twice over, himself, or by his agent, yet, that *Amyand* shall be considered as his trustee, in the insurance he made, and that the interest in it shall follow the property of the goods.

If *Amyand* is to be considered as a trustee, and the policy he procured, as belonging to *Tamesz*, then, under the statute of 19 *Geo. II.*, the plaintiffs can recover nothing, not even the half which they seem to give up: for, by that statute, this second policy, procured by *Tamesz*'s correspondent, would be void, as the underwriters of the first were not insolvent, &c.

But suppose, that act had never been made: they must then shew, that *Tamesz* has a right to the first policy, at all events; and, in order to prove that, they say, that the policy was *Meybohm*'s; and, if so, passed, by the indorsement of the bill of lading, to *Tamesz*.



But *Amyand* had an interest of his own; and he might want to insure, in expectation that the goods would come to him, and he should then have a *lien* upon them, for the balance due to him from *Meybohm*. He insured to the amount of £1900 before he received any directions from *M.*, before he knew *M.* would be at the expense of the insurance, or what would be shipped on board. So that the ground of all, (*viz.* that this was *Meybohm's* policy) fails.

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As to the other £900: *Amyand* has made no declaration of trust on the policy, but is at liberty, now, to say it is for himself. And, in fact, *Amyand*, in court, on the trial, did declare, that he insisted on that policy for his own benefit, and refused to give it up, and declined letting his name be used. So that *M.* could not recover any thing under it.

But suppose the policy was *Meybohm's*, and made on his account, but remains in *Amyand's* hands: the question then would be, whether *Tamesz* can have any satisfaction under it?

1. He cannot sue the underwriters, as the policy is not declared to be for his use.

2. He could not come against *A.* either in law, or equity, because he, as factor for *M.*, had a *lien* upon it for the balance due to him from *M.*, according to a case which has been solemnly determined. The case I allude to is that of *Kruger v. Wilcocks*, and others, at the Rolls, before Sir John Strange, 12th of March, 1754, which he determined by narrowing the *lien*. But on an appeal to Lord Chancellor Hardwicke, in Feb. 1755, he decreed, that a factor has a *lien* on all goods

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consigned to him, for the general balance due to him, so long as he retains the possession; but when he parts with his possession, he parts with his lien.

Lord *Hardwicke*, before he made his decree in that case, directed, that some eminent merchants should attend him; and, accordingly, Aldermen, *Baker*, and *Bethell*, and two others, came into court, and he proposed several questions to them publicly.

In the case of *Gardner v. Coleman*, in *June* following, the same point was allowed to be settled.

If *Tamesz*, then, had come against *A.* for the policy, he must, at least, have paid the balance of the account due from *Meybohm*. In *detinue*, he could not recover, for many reasons.

But to go a little further. Suppose *A.* had not a general lien. It is, at best, extremely doubtful, whether he could recover any thing under *Amyand's* policy; and, if so, must he recover only half against the defendants, and take up with a poor chance of recovering the other half under *A.'s* policy, when he had paid the defendants a premium for the whole?

There is no fraud laid to his charge. His correspondent told the defendants how the case was; they should, therefore, in justice, pay according to their contract.

If any thing should be recovered, by the plaintiffs, on *Amyand's* policy, the defendants would have a right to call for it, and to stand in the plaintiffs' place as to that: and it is like the common case of a salvage; the insured may call for a satisfaction of his whole loss, and abandon what is saved to the insurer.

If people are jointly, and severally, liable, the party may recover against one; and the rest must then, among themselves, contribute to the person who has paid the whole.

The plaintiffs, here, could not possibly, it is admitted on all hands, make use of *Amyand's* policy, without paying the incidental charges of procuring that policy.

In every light then, it is very plain, that the verdict is right, for the whole that is recovered.

Before I conclude, I will just observe, that by a *double insurance*, must be meant, two insurances by the same person, each for the whole value of the thing insured.

Damages on the *postea* to be marked £2300, &c.

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The KING *agt.* DENISON.—K. B.

THIS was a motion for leave to file an information against Mr. *Denison*, for refusing to accept, and take on him, the office of mayor of the borough of *Leeds*, in *Yorkshire*, which appeared to be a necessary office, for the good government of the corporation.

The defendant, on shewing cause, swore, that his mercantile concerns obliged him to be abroad in different parts of *Europe*, for many months at a time, and that it would be very inconvenient for him to be obliged to reside at *Leeds*, for a year together.

An information for not taking an office in a corporation, is not to be filed against one neither usually resident therein, nor obstinately refusing.

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It appeared, that the corporation had a power to fine those, by their charter, who, after they were properly elected, refused to undertake this office: but they did not here proceed that way.

By the charter, the defendant was to take the oath of office, within seven days after his election; but here he had no notice of being elected (at any of the three times he had been nominated) till that time was elapsed.

It was said for the prosecutors, that the corporation would be dissolved, if the persons eligible into this office were not obliged to accept it.

Lord *Mansfield*, C. J.

I have no doubt but an information will lie for a refusal to accept an office of this nature; but it must depend on the particular circumstances of the case, to induce the court to grant it. It should appear, there was some obstinacy, &c. on the part of the person elected.

By the constitution of this corporation, the mayor is to be sworn in within seven days from his election. Now it appears in this case, that the defendant was abroad, beyond sea, two of the years, when he was elected, and in *London*, the third.

Besides, here is another remedy, by fine.

But, if he is guilty, yet there are no aggravating circumstances in this case; and, therefore, I think, the rule should not be made absolute.

If, hereafter, he should refuse, after notice given him in time, and be fined, and still refuse, it may be, then, proper for the court to interpose.

*Denison, J.*

If the defendant was a person who knew he was to be elected, and had contemptuously gone away, to avoid being chosen, then it would be a proper case for the court to interpose.

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There being a power of fining, is no reason why this court should not interpose, unless they choose to proceed that way.

*Foster, and Wilmot, Js.*, concurring, the rule was discharged.

The KING *agt.* The INHABITANTS of FLECK-  
NOW, in WARWICKSHIRE.—K. B.

INDICTMENT, at *Lent Sessions*, 1756, against the defendants, for not repairing a common highway, leading from the township of *Shuckburgh*, through the said hamlet of *F.*, to the township of *Sawbridge*. Plea, by two of the inhabitants, for themselves, and all other the inhabitants, except *George Watson*; that the said *George Watson*, by reason of his having inclosed the lands adjoining, and continuing the same so inclosed, ought to repair, &c. and traverse, that the hamlet ought, &c.

The repair of a road newly laid out under an inclosure-act, is to be borne by those to whom the former highway was chargeable; and not by the owner of an inclosure made in pursuance of the statute.

Replication, with a *protestando*, that the hamlet ought to repair, &c.: and for replication, that the place in question was (before the act of parliament after mentioned) an ancient, common, open, highway, within the manor of *F.*, over a common field. That 15 *Geo. II.* authorizes

1 *Burr.* 461.  
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the proprietors to inclose, and appoints commissioners to allot the several parties shares, who are to accept their allotments in three months, and to inclose, with ditches, within two years. That they should lay out proper highways, forty feet broad; and the persons whose lots should adjoin thereto, should maintain the fence adjoining. That after such roads should be so laid out, all persons should use them, and no others.

They allot *Watson* eighty-five acres, and twenty-nine perches, for his share (through which the road in question passes), and direct, that it shall continue an highway, forty feet broad, at the least. That *Watson* accepted his share accordingly, and has since inclosed, &c. leaving a road of forty feet. That *W.* has inclosed in no other way than as aforesaid; that the defendants, therefore, ought to repair, and traverse, that *Watson* ought.

Rejoinder admits the act, and proceedings in consequence of it; but says, that *W.* did inclose, and ought to repair. Issue on this.

The indictment, &c. were removed, by *certiorari*, to this court, and tried at *Lent* assizes, 1757, and the defendants found guilty, subject to a case, for the opinion of the court:

Whether, in this case, the inhabitants continued liable to repair, notwithstanding the inclosure, or whether they are thereby discharged?

Serjeant *Hewitt*, for the prosecution.

There are four sorts of people liable to repair common highways. 1st. The parish in general; 2d, a particular

hamlet; 3d, a private person, by reason of his tenure, or by inclosing; 4th, a corporation, by prescription.

The 2d and 3rd are the only cases on which the present question arises, and the second, no further than whether they continue liable as formerly, which depends on the 3rd, which is the main question, *viz.* whether, by any thing appearing on this record, *Watson* is bound to repair? If not, the consequence is, that the defendants continue liable.

Let us inquire, whether this is within the reason, and principles, on which private persons have been held liable on account of inclosing.

The foundation for it is, that inclosing of a road (that before was open) is an encroachment on the right of the public, who, if the common track becomes foundrous, may go to the right, or the left, by their right of passage; and, therefore, if a party will, by his right of ownership, as he may, (without any other authority,) inclose, he must then take upon him to keep such inclosed road in repair: but may throw it open again when he will. 1 Ro. Abr. 390, a. pl. 1. and 390, b. pl. 1. *Shep. Epit.* 1116. 2 *Saund.* 160. *Sty.* 364. These cases shew, the charge falls on the party inclosing, on account of his encroaching on the public.

The present is a very different case. The act was for the mutual benefit of all parties, including the whole hamlet, who were before liable to repair the roads. The commissioners have allotted the parties' shares: they have set out the roads as the act directs, and thereby annihilated all the old roads, which, the act directs, are not from thenceforth to be used. The act directs the persons whose

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lots shall adjoin to such road, to repair the fences, but says nothing about repairing the roads: that is left to fall as before: and, indeed, to lay it on the adjoining lots, would deprive them of all benefit, the charge of repairing being more than the inheritance is worth, which could never be intended.

The inclosing was designed to be a benefit to the owners, and, at the same time, the act stipulates, and provides, a road of proper dimensions for the service of the public; and though it happens, that the new road, laid out by the commissioners, is a part of the ancient, open, road, this makes no difference; but the old ways are, in fact, annihilated by the act.

This case is very like turning a road upon an *ad quod damnum*, in which case the repairing the new road does (without particular provision to the contrary) fall on the same parties as the old did.

Mr. Caldecot, for the defendants.

He, first, offered to take exceptions to the pleadings, that here was a traverse upon a traverse, &c.; but the court interrupted him, saying, there was only one question now before them, and that any exceptions to the pleadings, &c. must be in arrest of judgment.

1. This is not an inclosing under the act.

2. If it was, yet the act (saying nothing about who is to repair) will not take away the legal consequences of inclosing.

1. The act does not direct the roads to be inclosed: and



this appears to have been an ancient, common, open, road, before the act. The act, directing roads to be laid out forty feet broad, means only new roads to be made in pursuance of the act, and not to alter the old ones; so the commissioners, in this case, ordered the road to be continued, but say nothing as to the breadth, because it was before open. Eighty-five acres, and twenty-nine perches, is allotted to *Watson*, and through this lies a common, open, road: if he incloses on the side of the road, it falls within the common rule in other cases, and subjects him to repair it; and the reason is, not only because he encroaches on the public, but, also, because the inclosing keeps the sun, and air, from drying the road, and thereby renders it foundrous. Besides, the inclosing in pursuance, is directed to be in two years, this was not till three years, and upwards, afterwards; and as to the clause of repairing fences adjoining to the roads, that must mean, where the bounds of a man's lands abut upon the road; here it was an open road, his land lying on both sides.

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2. If a man be owner of the ground, he has a right to inclose, without the consent of any body, taking the consequence of repairing, &c. upon himself; 1 *Hawk. P. C.* 202. is full upon this point. The common law holds equally strong in the present case; and the act was no otherwise necessary, than, as the ground was common before, to ascertain an ownership in particular parts; and then the right to inclose against the highways, becomes a consequence of ownership, subject to the charge of repairing. The inclosures, in either case, may, whenever the party pleases, be thrown open, and then the burthen of repairing is taken off.

Lord *Mansfield*, C. J.

The case is exceedingly plain. The principles for subjecting a private person to the burthen of repairing, by

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reason of inclosure, are agreed on both sides; and whether this case falls within them, is the question.

A private person, as owner of the adjoining, common field, lands, may inclose against the highway, leaving a convenient highway, and keeping it in good repair; for, as, by his inclosing, he has taken away the right the passenger had of going to the right, or left, in case the common track became foundurous, so it lies on him to prevent its becoming so.

The king, by his prerogative, may (as far as the public are concerned), by grant, consent to the changing an highway; but this is never done till an *ad quod damnum* has issued, and been returned; and if the jury return, that it will be no damage, then the king's licence may be (and ought regularly to be) obtained, before the road is turned; but, when that is done, the charge of repairing the new, falls on the same persons as were before bound to repair the old, unless (as is sometimes the case), the jury, from consideration of the situation, soil, &c., impose it as a condition, that the party applying shall maintain, &c.

The present case has been, very justly, compared to the *ad quod damnum*, and is a much stronger case. The commissioners are to lay out proper roads by admeasurement, and that without any regard to the old roads; and though they may be allotted in the same place as the old ones, yet are they, for every purpose, to be considered as new roads, laid out by the authority of the act, which supposes, and intends, that the whole shall be inclosed; and, therefore, provides, that the hedges, and fences, adjoining to these roads, shall be repaired by the owners of the adjoining lands, that no new burthen may, on that account, fall on the persons who are to contribute to the repair of the road. And the act, thus providing for the

repair of the fences, and being silent as to the road itself, is the strongest proof, that that is to remain as before. In every view, therefore, both from the letter, and intent, of the act, and from the reason, and convenience, of the thing, I am clear, that the charge of repairing ought not to fall on *W.* alone, but on the hamlet in general, as before the act; and, therefore, that the defendants are guilty.

*Denison*, J. concurred; and said, the act was a parliamentary *ad quod damnum*.

*Foster*, J.

The man has done nothing but what the act intended, and authorized him to do.

*Wilmot*, J.

There is no pretence to lay the whole burthen on *W.*, and ease the hamlet: that might be what the civilians call *damnosa hæreditas*, and the charge more than his estate was worth.

Judgment for the king.

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The KING *agt.* The INHABITANTS of MILL-  
LAND, in HAMPSHIRE.—K. B.

MR. YATES moved, last term, to quash an order of two justices, and the order of sessions, confirming the same, founded on the statute of 43 *Eliz.* c. 2, whereby *Milland* was ordered to contribute in aid of the parish of *St. Peter's*, a neighbouring parish, towards the poor's rates. An order for contribution in aid of a parish situate in a liberty, upon a place also within the same, is warranted by the 43d of *Eliz.* c. 2., when that is a division of country, equivalent to a hundred. 1 *Burr.* 576. S. C.

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1. Exception.—The justices' order does not state it to be in the same hundred, which the act requires.

2. After reciting, that *Milland* was not burthened with any poor, they appoint overseers in *Milland*, for this purpose only, of paying the contribution-money.

A rule to shew cause was then granted; and now, *Mr. Gould*, in support of the orders.

This order is founded on the 3d sec. of 43 *Elix.* which consists of two branches. 1st. Where a parish is burthened with poor, and an adjoining, or other, parish in the *same hundred* has no poor, there *two justices* may order that parish to contribute, &c. 2dly. Where no parish in the hundred is liable to contribute, there the *quarter sessions* may order a parish (not burthened, &c.) in *any other hundred* in the county, to contribute.

The sessions order states, that the parish of *St. Peter, Cheesehill*, lying in the liberty of the *soke* of *Winchester*, being burthened with poor, &c. and *Milland* being an extra-parochial place, and not burthened with poor, adjoining to *St. Peter's*, and lying in the liberty of the *soke* aforesaid, the parish officers of *St. Peter's* applied to two justices to make an order of contribution, for *Milland* to contribute, &c. That, those justices doubting whether they had jurisdiction, the matter was, by consent, referred to the then next sessions, where it was debated by counsel, and the sessions were unanimous, that *Milland* ought to contribute; but that they had no original jurisdiction; and therefore, referred it back to the justices, who then ordered *Milland* to contribute a gross sum of £20, and appointed two substantial householders of *M.*, to be overseers for raising, and paying, the same. This order was confirmed at the sessions.

Two exceptions were taken on obtaining the rule:—  
1st, Because the two justices have no jurisdiction, but within the hundred, and this is not said to be within any hundred, but *the liberty of the soke of Winchester*.

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2d, That *Milland* having no poor, the justices could not appoint overseers, merely for raising this £20, for that is delegating their power to others, which they cannot do. 2 *Str.* 1114. But this last point is now given up, as that must depend on the first.

This objection is founded on a case in *Foley*, 27. but that is a loose note, so shortly stated, that, for ought appears, it might be plain on the face of the order, that it lay in another hundred, and then, clearly, two justices have no jurisdiction, but the sessions only.

The other case is in *Foley* 31. and in *Viner's Abr.* (Poor) 416. where the order was quashed by *Holt*, because it lay in no hundred.

But here there is the strongest reason to induce the court to be of opinion, that the term *liberty*, here used, is synonymous to the word *hundred*, which is vague, and uncertain. Wapentake is well known to be precisely the same thing, and the act must be interpreted to mean any known district, which answers to a hundred. And here the sessions, by declaring that they had no original jurisdiction, but that two justices must first make an order, have, virtually, found it to be in the same hundred, because, otherwise, two justices have no jurisdiction.

Mr. Norton, and Mr. Yates, *e contra*'.

Not to rely on the authority of the cases in *Foley*,

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though in point, the words of the act itself confine it to a hundred.

It is a rule, that in no inferior court whatever, much less an order of two justices, nothing that is a point of jurisdiction can be intended, but must be precisely alleged; therefore, if it be possible, (as it is very probable,) that this is in another hundred, then the justices had no jurisdiction, and the opinion of the sessions, to the contrary, can have no weight, as their order is now appealed from. And a case might happen, where neither the justices, nor the sessions, would have power to make an order on a parish in another hundred; as suppose there was a parish in the same hundred fit to contribute.

As to the word, hundred, being vague, and uncertain, the contrary is the truth, for it originally contained ten tithings, but liberty is quite uncertain, often extending into many hundreds, and sometimes many liberties lying in the same hundred.

Lord *Mansfield*, C. J.

If there is not enough stated for us to intend this to be a division, answering the description *hundred* in the act of *Eliz.* on which this question depends, it must go back to be more fully stated, for it is clear, that any division, answering to that of hundred, let it be called by what name it will, as lath, wapentake, &c. will be within the purview of the act, as in *Westmorland*, in particular, there are no hundreds.

(Here *Norton* mentioned a case of a robbery in *Westmorland*, and an action was brought against the proper division, with the requisite averments, that there were no such divisions there as hundreds.)

The rest of the judges concurred, and *Foster* said, the case in *Foley*, 31. could not be law, and that *Foley*, though a judicious man, must have been a very young note-taker in *Holt's* time. Mr. *Gould* said, that in *Skin.* 258. there is a case directly contrary.

The order was sent back to the sessions, to be more fully stated.

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bitants of  
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In *Easter* Term following, the sessions returned another order, stating, that the liberty of the soke doth contain the six following tithings, to wit, the parishes of *St. John*, *St. Peter's*, *Cheesehill*, *St. Michael's*, and *St. Swithen's*, the close of the City of *Winchester*, *St. Bartholomew's*, *Hyde-street*, and *Bishops' Sparkford*, together with the said tithing of *Milland*; and that the Bishop of *Winchester*, for the time being, is lord of the said liberty; and that the said six several tithings, and the said tithing of *Milland*, do not lie within any other hundred. That a court leet is held for the said liberty twice every year, and that two constables are annually chosen for the said liberty at that court. That the said tithings are divided into two divisions, and that one of the said constables hath jurisdiction over the west division, and the other over the east; and that the constables are nominated by the grand jury at the said court leet; and three tithing men are annually nominated by the said constables for each of the said divisions; and that the said constables do return persons within the said liberty, who serve as jurors at the assizes, and quarter sessions, in the same manner as constables of hundreds do; and that the said liberty is bounded by the hundreds of *Buddlesgate*, and *Fawley*, and the city of *Winchester*, in the said county, and the

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said constables, or tithingmen, have no right to execute any writ, or warrant, of the said court in either of the said adjoining hundreds, or any other neighbouring hundred, or to summon, or return, any people within any other hundred, to serve as jurors for the said county. That, within the said liberty, is a court called the Cheney court, which has jurisdiction over the liberty of the Bishop of Winchester. And, in a paper-writing, entitled, *nomina villarum infra libert' de le Cheney court*, containing an alphabetical list of several places over which the said court hath cognizance of pleas, the said six tithings, or the tithing of Milland, are not mentioned.

This return being made, Mr. Norton gave up the point, and the orders were confirmed, without further argument.

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The KING agt. PAGE.—K. B.

A rule,  
fraudulently  
obtained,  
discharged  
with costs.

*PER Curiam*.—If a rule *nisi*, for an information, be obtained by a notorious suppression of truth, or false suggestions, and it so comes out, on shewing cause, the court will discharge the rule with costs.

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ANONYMOUS.—K. B.

Judgment  
against the  
casual  
ejector, not  
to be had in a  
future term.

Mr. LAWSON moved for judgment against the casual ejector, in a *Middlesex* ejectment. The notice being to appear of last term, the court, upon consulting the officers, held it could not be done.



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RUSSELL, *qui tam*, &c. *agt.* ———. K. B.

THIS was an action against the defendant, for having, in his house, in *Drury-lane*, in the county of *Middlesex*, within the liberty of *St. Peter's, Westminster*, within the lordship of the dean and chapter of *Westminster*, within three miles of *London*, two hides of leather before they had been sealed at *Leaden-hall*, &c. The action was grounded on 1 *Jac.* 1. c. 22. § 38.

Causes shewn for staying judgment, in an action on the 1st *Jac.* 1. c. 22, and overruled. 1 *Burr.* S. C.

Verdict for the plt.

Messrs. *Whitaker*, and *Nares*, now moved in arrest of judgment.

1st Objection. It is not alleged, in the declaration, or other proceedings, that the defendant is a tanner, currier, or other artificer, occupying the business of cutting of leather; and no other trades are subject, as appears by the preamble of the statute. *Cro. Car.* 587.

2d Objection. The jurisdiction of the city of *London*, is, as to this species of offence, extended three miles beyond the limits of the city. The searchers for that extent are to be of particular companies in *London*. The place, therefore, where this offence was committed, viz. *Drury-lane*, being within three miles of the city, the share of the penalty given to the lord of the manor, in general cases, should here go to the chamber of the city, as this place is to be considered as within the city, being subject to the searchers of the city, &c.

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RUSSELL

agt.

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3d Objn. The *venue* is mistaken : it should have been laid in *London*, for three miles round the city, are, as to the purposes of this act, to be considered, to all intents and purposes, as within the city.

*Per curiam,*

All these exceptions were, immediately, over-ruled, without hearing counsel on the other side.

1st. The preamble alone mentions these trades, but the body of the act extends to all persons; and is not to be restrained by this special preamble.

2dly. The jurisdiction is a very distinct thing from the locality of the place where the offence was committed. Here it was in *Drury-lane*, which is within the manor of the dean, and chapter, of *Westminster*, and, therefore, part of the penalty is properly demanded for them.

*Postea* to be delivered to the plaintiff.

The KING agt. BRIGHT.—K. B.

An indictment preferred on the st. 21 H. 8. c. 13., not to be sustained.

THE defendant, who was a clergyman, was indicted at the Norfolk sessions, on 21 Hen. 8. c. 13., for taking to farm lands not his glebe.

This indictment being brought up by *certiorari*, Mr. Serjt. *Hewitt* moved to quash it.

1st Objn. That an indictment will not lie, the statute

giving a penalty of £10 a month, to be recovered by original writ, bill, plaint, &c. and indictment not being named, nor the words, or otherwise, no indictment lies. *Hawk. P. C.* 210. ch. 10. § 4. *Cro. Jac.* 643. 4 *Mod.* 144. *Cases temp. W.* 3. 104. 6 *Co.* 19. *Cro. Car.* 112. and the precedents prove it, there being many of actions, but none of indictments, on this statute.

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2d Objn. The statute says, every such person taking to farm, shall incur a pain of £10 a month, for every month he shall continue to *occupy*, &c. Here the indictment is only, that he took to farm for 21 months: this is nonsense, and bad; and should be, that he *occupied* for 21 months, &c.

*Mr. De Grey, e contr'.*

The statute is *pro bono publico*, and for maintenance of religion. The rule is, where a statute creates a new offence, by a prohibitory clause, as here, that a clergyman *shall not*, &c. there an indictment lies for the breach, though it be not named in the act, and though a pecuniary penalty be provided; but not to recover the penalty, but the party to be fined not exceeding the penalty.

But where the clause only is, that all parties doing so and so, shall incur such a pain, there no indictment lies, without it is mentioned in the statute. 2 *H. H. P. C.* 171. 1 *Mod.* 34. 1 *Vent.* 63. *Rex v. Baker*, 3 *Keb.* 75. *Raym.* 201.

2d. The occupation is only to ascertain the *quantum* of the penalty, but the offence is the taking to farm; and this being an indictment for the offence, and not the penalty, is according to the act, and good.

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*Lord Mansfield*, C. J. said, he took the rule to be, as *Serjt. Hewitt* mentioned, that if the prohibition, and the penalty, were all in one and the same clause, there no indictment would lie, unless it was one of the remedies named in the act. But if they were in distinct and separate clauses, there an indictment would lie on the prohibitory clause. But, as the cases cited by *Mr. De Grey* seemed to contradict it, the rule must be enlarged to next term, if *Mr. De G.* thought he could support it.

*Denison*, and *Wilmot, Jr.*, were of the same opinion, and said they believed those cases had been, long ago, denied to be law, and that otherwise they could not see but the party might be punished both ways for one offence, as they did not think a conviction on an indictment could be pleaded in bar to an action for the penalty.

The rule was enlarged till *Easter Term*, when the indictment was quashed, *Mr. De Grey* not appearing to support it.

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The KING agt. MARTHA GRAY.—K. B.

A cause will not be deferred till the final decision in an action for a libel, by reason of which it was originally put off.

1 *Burr. S. C.* assizes.

THIS was an indictment against the defendant for obstructing a road through *Richmond Park*. At the last assizes for the county of *Surrey*, when the cause was to have come on, a libellous pamphlet appeared, tending to poison the minds of the jury in favour of the prosecution.

For that reason, the cause was put off at last *Surrey*

Against the authors, and publishers, of this pamphlet, (one of whom, lately dead, was a principal prosecutor in the indictment) an information had been moved for, and granted, but was not yet tried, though it was intended to be tried at the next sittings, but judgment could not be given till next term.

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The prosecutor in the indictment had given notice to try the cause at the next assizes.

Mr. Attorney-General, Sir *Richard Lloyd*, and Mr. *Norton*, moved this term to put off the trial of this indictment till the summer assizes, as, in the mean time, the information of the libel would be determined, and judgment given on the offenders.

Mr. *Knowler*, Mr. *Harvey*, and Mr. *Howard*, shewed cause against this rule, upon an affidavit of the prosecutor, that he had old witnesses, who were infirm, &c. But he did not disclaim any knowledge of the authors of the pamphlet.

Mr. Attorney-General, on that, observed, "*qui tacet, satis clamat*:" and if they were afraid their witnesses would die, they might examine them *de bene esse* before a judge on oath, and then no injury would be done them.

Mr. *Norton* cited *Rex v. Rotheram*.

Lord *Mansfield*, C. J.

Every thing necessary to attain justice, when there have been such proceedings as in this case, should be done.

I have no doubt, but the publishing this pamphlet was

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a contempt of this court, and that an attachment might go for it. What sticks with me, is, how the trial will be fairer after conviction, and judgment, in the information, than at present? If it appears that it will be fairer, I shall have no doubt to put off the trial.

It stood over for a day or two, when Lord *Mansfield* gave the opinion of the court, viz.

Lord *Mansfield*, C. J.

There is no suggestion that any further inquiry is necessary, or expected. The only reason for this application is, that an information is granted against some publishers, &c. Whether they are, or are not, found guilty, whether the punishment on them be light, or heavy, I cannot see how that will affect the trial. There is no doubt what is the sense of the court, in relation to that offence; and how then the punishment can operate, I cannot see. Therefore I see no reason to put it off on that account.

I should be afraid of connecting the two causes together. Whether they are acquitted, or not, will signify nothing to the merits of this indictment. If I saw how they were connected together, I should certainly make no doubt of granting the motion. I should have deferred it as long as there was any reason to expect further lights, but now no more are expected,

We are of opinion to discharge the rule. I do not know what my brother *Foster's* opinion is.

Rule discharged. *Absente Foster, J.*

*Easter Term, 31 Geo. II. 1758.*

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The KING *agt.* MARY MEAD.—K. B.

IN *Hilary* vacation, Mr. Justice *Denison* issued a *habeas corpus* at common law, tested the last day of *Hilary* term, at the instance of *John Wilkes, Esq.*, directed to Mrs. *Mead*, to bring before him, at his chambers, the body of her daughter, the wife of Mr. *Wilkes*.

A wife living apart from her husband, according to the terms of a deed of separation, is no longer subject to his authority.  
1 *Burr. S. C.*

About two or three days before this term, a special return was made to the judge, setting out articles of agreement for a separation between the husband and wife, and a covenant from the husband to let the wife live separate, and not to molest her, &c. That the wife accordingly lived with her mother, and was without restraint, &c. and produced her.

It being so near term, the judge ordered the return to be made in full court, and the lady to appear, &c. which was accordingly done; and the cases of *Rex v. Lyster*, 1 *Str.* 478. and *Rex v. Clarkson*, 2 *Str.* 445. and 2 *Lord Raym.* 1334. were cited to shew, that where the party appears to be at full liberty, the court will not interpose, and that here the husband, having consented to her living separate, had no right to compel her to cohabit with him; and, as she chose to continue with her mother, it was prayed that the court would send her back to her mother's house, under the care of a tipstaff of the court.

Lord *Mansfield*, C. J.

The husband has, in consequence of his marriage, a right to the custody of his wife; and whoever detains her

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from him, violates that right; and he has a right to seize her wherever he finds her.

But he may waive this right, as he has done heré, by the articles of separation, which are a renunciation of his marital right to seize her: and his attempting to do so, after entering into such articles, or after a suit instituted by her against him in the spiritual court, for a divorce, is a breach of the peace; and, if it was not so, it would be perilous to wives, who are forced to separate themselves from their husbands.

Courts of equity always decree a specific performance of such articles of separation as these, and a bill always lies for that purpose; though where there are no articles, and the wife sues only for alimony, they have doubted, whether they could retain the bill, except in cases where the arms of the ecclesiastical court were not long enough to give relief, as where the husband departs the realm, &c.

As to the sending a tipstaff home with the lady: there is no doubt, but that if a person applying for a *habeas corpus* offers to impeach the liberty of the person he requires to be produced, either in coming to, or departing from the court, it is a high contempt: however, an officer shall go with her, if desired.

(But Mr. *Wilkes* giving his honour, that he would not molest her, if she chose to go back with her mother, and not return to him; this request was waived, and the wife dismissed, with an assurance, that she was at free liberty to go home, and live where, and with whom, she pleased, and might permit her husband to visit her, if she thought fit, but that he had no coercive power over her.)



1758.

**JAMES CARLETON** (on the several demises of John Griffin, and Thomas Harrison) *agt.* **LAVINIA**, *alias* **LAVINER GRIFFIN**, an infant, by Mary Griffin, widow, her next friend and guardian.—K. B.

THIS was an action of trespass, and ejectment, for a messuage in *St. Saviour's, Southwark*; which came on to be tried before Lord C. J. *Willes*, at *Lent* assizes, 1757, at Kingston, where the case appeared to be :

That *John Griffin*, one of the lessors of the plaintiff, was only son and heir of *John Griffin*, who died seised of the premises in question.

. That the said *John Griffin*, being so seised, and of sound mind, did, in his life-time, viz. the 22d of *May*, 1752, with his own hand, write upon a sheet of paper, as follows, viz.

“ Know all men by these presents, that I, *John Griffin*, dealer in brandy, &c. &c. I make the after-mentioned my last will and testament, I being in perfect health and my senses, and in the name of God, amen. And when it please God to call me, I pray God to direct my relict. I make my present wife, *Mary Griffin*, my whole and sole executrix of what it hath pleased God to bless me with. I desire she will be advised by the rector or lecturer of the parish where I die, which she thinks proper, &c. I order my son, *John Griffin*, by my first wife, £100, to be paid him in six weeks after my funeral, except my executrix has a receipt from him, that the £100 had been paid him since I made this will, and if the said £100, my son to have no demand, but

An addition to a will, written long subsequent to the former part, and duly attested, on the same sheet, corroborates the whole, within the statute.  
1 *Burr.* S. C.

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" what my wife, my executrix, pleases to give him. I  
 " have bought £600 in the 1743 3 *per cent.* annuities,  
 " which I order not to be sold, but order my wife to have  
 " the interest, to help to bring up my daughter Lavinier.  
 " I likewise have two freehold houses in *Morses Alley*, by  
 " *Ladd's Court, Maid's Lane, Southwark*, which is for  
 " the same use, to help bring up my daughter Lavinier,  
 " and her heirs, for ever. And my daughter to take pos-  
 " session of her annuities at 25, or a month after marriage,  
 " if above 21 years of age, when married. And if it please  
 " God, my daughter die before her mother, and unmarried,  
 " and die without a lawful heir, then the said two houses  
 " to go to my son *John*, and his heirs for ever, my wife, my  
 " executrix, to dispose of the £600 annuities, in case my  
 " daughter and her heirs does not live to enjoy the said  
 " £600, &c. &c. This is my last will, and not any other.  
 " 22d day of *May*, 1752.

" John Griffin, *seur.*"

He subscribed his name to what he so wrote, without putting any seal, or having any witness thereto. That the said *John Griffin*, the father, being so seised, and of sound mind, afterwards, viz. on the 5th of *January*, 1754, with his own hand, wrote upon the same sheet of paper, as follows :

" *Blackman-street*, 5th *January*, 1754, new style.

" Memorandum.—Whereas I have laid out upwards  
 " of £300 on a lighter called the *True Friend*, and  
 " sellar, in *Water-lane*, near the Custom House, which  
 " have taken ready money, that the barge called *The*  
 " *Lemmon*, rented by *Richard Birch*, senior, and brother  
 " *Richard Birch*, junior, or any water craft that I may  
 " be possessed of at my death, to be all at my present  
 " wife *Mary's* disposal. And this not to disannul any

" of the *former part* made by me, 22d *May*, 1752, except on my son *John*, that my wife shall not be liable to pay the £100 in six weeks, but that she may take 5 years, and £5 a quarter, &c. Witness my hand, dated as above.

" *John Griffin, senr.*"

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The testator subscribed his name thereto, in the presence of three witnesses; and that he took the sheet of paper in his hand, and then, in the presence of the three witnesses, declared it was his last will and testament, and delivered to the witnesses as such, and desired they would all three attest it, which they did accordingly, in his presence, and in the presence of each other.

Upon this case, two questions were reserved at the trial, for the opinion of this court.

1. Whether the second instrument was a publication, or republication, of the first, as a will, so as to pass freehold lands?

2. Whether any interest passed in the premises to the defendant, the daughter of the testator, or to her mother?

This case was argued by Mr. *Arthur Barnard*, for the plaintiff, and Mr. *Burrell*, for the defendant, after which judgment was given.

Lord *Mansfield*, C. J.

This is a clear case, and, as the court has no doubt, and the estate is but of small value, we will not put the parties to the expense of another argument.

1. The case is accurately stated, in not calling the former

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part a will, nor the latter a codicil, but that he wrote on a sheet of paper.

Clearly it was of the party's own wording, and, at the signing, in 1752, he thought no further solemnity was requisite; but between that time and 1754, he was better advised; and intending to add another clause to his will, (though merely relating to his personal estate, and so, being of his own hand, requiring no witnesses), he takes that opportunity of performing the requisites for establishing the former part of his will, wrote in 1752. This appears, beyond a doubt, by the words he uses, never calling this additional clause a codicil, but declaring that it shall not disannul the *former part*. This necessarily connects the whole together, and incorporates it as one complete will; and, therefore, the question, how far an omission of the requisite solemnities, in publishing a will, may be supplied, by executing a subsequent codicil, does not arise in this case, as the whole makes but one complete will, which may be written at different times, and with different ink.

2. The second point is almost too clear to require an answer. Either the mother, or daughter, took an interest, which will equally put an end to the plaintiff's title to recover in this ejectment.

It may be a doubt, whether the mother takes a chattel interest, during the daughter's infancy, like *Boraston's* case; or is only a trustee for her daughter, during her minority. But this makes no difference, as to the plaintiff. The daughter takes a fee-simple, subject, perhaps, to a contingent limitation to the son, by way of executory devise, if the daughter dies under twenty-one, and without issue.

*Denison, J.*

1. A man may write his will at different times: and so may perfect the execution at different times. The witnesses too may subscribe at different times, as was lately determined in this court.

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I would almost venture to say, that, had it been a will and codicil by distinct instruments, the codicil would have perfected the will. But here the case is clear, as the whole makes but one will.

2. As to the second point; clearly, an estate passed by the will, and whether to the mother or the daughter, needs not be determined.

*Wilmot, J.*

1. This appears to me to be an extremely clear case. It plainly was only a continuation of one entire act, as appears, not only from the words confirming the former part, but the language throughout; there being no substantive words to make it distinct, but it is ingrafted into the former part: and his declaration, at his delivering the sheet of paper to the witnesses, that that was his will, &c. can admit of no other construction.

2. As to the second point, it is immaterial to the plaintiff, what estate passed. But it should rather seem, that the mother took a chattel interest; and though the words are very inaccurate, yet they sufficiently denote, that the daughter is to take the inheritance, as the son (the heir at law) is precluded by express words, so long as his sister has heirs.

*Postea* to be delivered to the defendant.

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N. B. It seemed agreed by *Clarke*, Master of the Rolls, and Mr. *Sewell*, and was not denied, 26 Nov. 1759, at the Rolls, that if a will is incompletely executed, it cannot be made good by an after-made codicil, duly executed, though it ratifies the will.

This was *obiter*.

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ANONYMOUS.—K. B.

A defence  
 not insisted  
 upon below,  
 cannot be  
 set up, in  
 error.

ERROR on a judgment given in the Palace court. One count in the declaration was for *money lent*. The defendant appeared by guardian, as an infant, and pleaded *non assumpsit*. Verdict for the plaintiff, and entire damages. It was now alleged for the defendant, that as it appeared on the record, that he was an infant, the plaintiff ought not to recover for *money lent*, as an infant could not contract such a debt, and for this was cited 5 Mod. and 10 Mod.

*Sed per cur'.*

It does not appear to us that the defendant insisted on this defence below. We will not believe that he is, in fact, a minor; but, for any thing that appears, this may be a scheme, to endeavour to defeat the plaintiff's action.

Judgment affirmed.

ULUGH *agt.* KINGSWOOD.—K. B.

THE copy of the *latitat* wherewith the defendant was served, was directed to the sheriff of *London*, and not sheriffs. The defendant apprehending, the copy of the writ was irregular, did not appear thereto: the plaintiff entered an appearance for him, and caused him to be served with notice of a declaration being filed.

Proceedings set aside on a writ directed to the sheriff, instead of the sheriffs of *London*.

A rule *nisi* was obtained for setting aside these proceedings, with costs.

Mr. *Norton* shewed cause.

The irregularity consists in a single letter being omitted, and therefore will not be much countenanced; especially as the defendant is now in court, and appears here by his counsel, and this writ is merely to bring parties into court.

I have now the writ in my hand, and it is right.

Mr. *Gould, e contr'*.

How the writ is, signifies nothing; the copy is all that we have, and if that does not tally with the original, the affidavit of service is wrong. Besides, it is not, that s was in the writ, when the copy was served, and it seems to be added lately.

Lord *Mansfield*, C. J.

The reason of the service of the copy, is to give the

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defendant notice to appear. He has here, the same notice which he would have had, if the copy had been agreeable to the original writ; and, I think, it might as well be objected to, if there was an apostrophe in the copy, instead of the letter *e*.

I wish we could set it right, without any delay being occasioned.

*Denison, J.*

I apprehend, we ought to keep to the form of the writ.

There is no such person as the sheriff of *London*: they are sheriffs in *London*, and have two counters, though they make but one sheriff in *Middlesex*. The want of one letter, may make as great a difference in the substance of the thing, as the want of twenty letters. If the defendant had appeared himself, the application would have been too late, but it is not so, as the plaintiff has appeared for him.

*Wilmot, J.*

It has been determined, a redundant letter would not hurt, but this is deficient. But *Denison, J.* said, to the sheriffs of *Middlesex* would be wrong.

Rule absolute, but without costs.



*Ex parte* BOSEN, and J. J. BRANDT,

Or

The KING *agt.* BARBER, Esq.—K. B.

MR. MORTON moved for an attachment against the commander, &c. of one of the King's ships. The case was this.

A *hab. corp.* at common law, issued to bring up these two persons, who were impressed. The person who had the writ delivered to him to serve, could not have access to the captain, whereupon he delivered it to the lieutenant, who threw it out of his hand, and the mate, &c. trampled on it, defaced it, and then kicked it overboard. It was sworn, the captain was in the cabin, but it did not appear, he had notice of what was done.

On disregard shewn to a *hab. corp.* at common law, at attachment immediately granted.

Whereupon the court granted a rule for the lieutenant, mate, &c. to shew cause why an attachment should not issue against them for this contempt. And an attachment immediately against the captain, but with directions, as in Lord *Ferrers's* case, not to execute it, if the captain paid immediate obedience to the writ. The court gave these last directions, because the affidavit did not fix it positively on the captain.

The C. J. took an opportunity in this case to declare, that there is no difference, in this court, between enforcing obedience to writs of *habeas corpus* upon the statute, and those at common law, except it be in favour of those at common law; because they always are for a wrongful imprisonment, and therefore attachments have, in some instances, issued immediately for disobedience to them, without waiting for a rule to shew cause.

CAVIL *agt.* BURNAFORD.—K. B.

An inferior court may set aside a regular interlocutory judgment, to let in a trial of the merits.  
1 *Burr.* S. C.

MR. HUSSEY shewed cause, why a *mandamus* should not issue to the shire clerk, and also to the suitors of the county court of *Cornwall*, to give final judgment in this case.

It was an action in replevin, upon a distress for rent.

The plaintiff signed an interlocutory judgment, and took out and executed a writ of inquiry, which writ and the inquisition were set aside for irregularity, *viz.* for want of due notice of the execution. The court below afterwards, upon motion for that purpose, set aside the said interlocutory judgment, and received the defendant's avowry, in order to let the merits be tried.

The interlocutory judgment appeared to have been regular, as far as respected the court, but there appeared to be some surprise on the party; and an affidavit was made, that the defendant in replevin had merits.

In support of the rule was cited *Fox v. Glass, Str.*, and *Str.* 392.

The court took two or three days' time, to consider, and then gave judgment, as follows.

Lord *Mansfield*, C. J.

The question is singly, whether an inferior court can set aside a regular interlocutory judgment, to let in the merits?

And we are all of opinion, that an inferior court, to let in the merits, may set aside an interlocutory judgment, though regular. There is no authority to the contrary.

They cannot, indeed, set aside a verdict, and grant a new trial. And there may be many reasons, why they may do the one and not the other; as, for instance, a writ of attaint does not lie in those courts.

If, then, there are no authorities against the practice, I can see no reason why it may not be done.

Upon the reason of the thing, therefore, and the convenience of it, the rule must be discharged.

*Denison, J.*

In a case which happened in *Easter Term*, 28 G. 2. in this court, it seemed to be taken as a general rule, that an inferior court could not set aside a verdict in any case. I find, that I have made a N. B. at the bottom of my note of the case, as follows, *viz.* "I think this is not to be taken for granted." And I see no reason why they may not set aside a verdict *for irregularity*, as well as a judgment; though they cannot do it on the merits: and the reason given for the latter is, because this court will not entrust them with so great a power; and also because no attaint lies upon verdicts except in the courts in *Westminster hall*.

N. B. The C. J. seemed to agree with *Denison*, and the other Judges did not contradict him.

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CAVIL  
agt.

BURN-  
FORD.  
K. B.

WALKER, *qui tam*, &c. agt. KEENE.—K. B.

A part only of money sued for, may be paid into court.

THIS was an action of debt, on the game laws. The whole sum demanded was £40. Mr. *Wynne* now moved for the defendant to pay £20, part of the sum demanded, into court, upon the authority of *Str.* 1217.

Lord *Mansfield*, C. J.

Is there not a difference between paying the whole, and part only? However, take a rule to shew cause.

Some days afterwards, this rule was made absolute, on Mr. *Wynne's* motion, without any cause being shewn: and Lord *M.* said, he thought it was very reasonable.

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 THOMAS agt. POWELL.—K. B.

The costs of a motion for a rule, &c. do not follow the verdict on a feigned issue, directed after hearing the particulars of the case. 1 *Burr.* 603. S. C.

AN information, in the nature of a *quo warranto*, was applied for against the defendant, to shew by what authority he claimed to exercise the office of coroner, for the county of *Glamorgan*. Upon entering into it, the court saw, it was a question of the extent of jurisdiction, and concerning a civil right, and therefore, a feigned issue was recommended, to try whether *Llan* was within the liberty of *Gower*, in the co. of *Glamorgan*, (for which liberty the defendant was appointed coroner, by the late Duke of *Beaufort*). The feigned issue went down to be tried at the *Hereford* summer assizes, 1755: and, then made a *remanet*, had been since tried, and a verdict

thereon given for the plaintiff. Mr. *Aston*, and Mr. *Nares*, now moved, that the master might be directed to tax not only the costs of the issue, trial, and *remanet*, but also of the original application for the information; and urged, that this differed from the cases of *Rex v. Griffiths*, and *Rex v. the Justices of Walsall*, in *Staffordshire, Trin.* 28 and 29 *G. 2.*, because both those were informations for misdemeanors, *viz.* The 1st for an escape; and the 2d for not signing a poor's rate, after a *mandamus* granted; but this is a *quo warranto* information, which is in the nature of a civil suit.

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 THOMAS  
 agt.  
 POWELL.  
 K. B.

Mr. *Morton, e contra*.

The rule for the information was absolutely discharged, on their own affidavits, for want of merits, before this issue was directed; and to try the right in this issue, was a voluntary offer from our side.

*Per cur.*

It was solemnly settled, in the case of *Herbert*, and another, *v. Williamson*, and another, in this court, about six years ago, that only the costs respecting the issue and trial, are to be allowed; and there is no difference between informations for misdemeanors, and *quo warranto* informations. It is nothing to the purpose, that costs are allowed in *quo warranto* informations, because, when the parties consent to the issue, every thing before is waived, and out of the case. And this is to be taken to be the general practice of the court.

Motion denied.

## ANONYMOUS.—K. B.

A judgment to which an administratrix had consented, misinformed of its consequences, set aside.

*A.* DYING intestate, indebted to *B.* upon bond, and to *C.* and others, upon simple contract, *D.*, his wife, took out administration, and, in less than a month after *A.*'s death, *C.* on behalf of himself and two others, applied to the administratrix, and was very pressing for her to confess a judgment in double the sum due to them. She mentioned *B.*'s demand, and said, she hoped they would not draw her in to do any thing to her prejudice, and on *C.*'s assuring her, that they would not, she executed the warrant of attorney, and, in a few days, judgment was entered up on it, and a *fi. fa.* taken out, and all the effects taken in execution. *B.* now sues her on his bond. Therefore she moved the court, that the judgment to *C.* should be set aside, and the goods restored, and that the attorney concerned should answer the matter of the affidavit.

*Per cur'.*

This is unjust in *C.*, and contrary to the plain intention of all the parties, at the making the agreement, and is taking advantage of the administratrix's want of knowledge of the law.

It was her evident intention, not to subject herself to pay *de bonis propriis*. Here she commits a *devastavit*, by confessing this judgment to the simple contract creditors.

If an administrator voluntarily pays a simple contract creditor, after another, in equal degree, has sued an

original, this is a *devastavit*, as was resolved in the case of the Bank of *England* agt. *Morrice*, and many cases since. So, by a rule in equity, analogous to this, if a bill be filed, and subpoena served, the paying afterwards voluntarily is a *devastavit*.

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ANONY-  
MOUS.

K. B.

The judgment was set aside, and the goods restored: but without prejudice to the plaintiff, if there are assets after *B.* is paid.

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The KING agt. PARKINS.—K. B.

*PARKINS* was brought up on a *habeas corpus*, and by the return, it appeared, that he was committed to *Wakefield* Bridewell, as a deserter.

An apprentice enlisted without his master's permission, may be discharged by L. C. J.

The fact was, he was an apprentice, and enlisted without his master's consent, which being represented to the officer, he granted him a furlough for the term of his apprenticeship, and that being now expired, and he not returning, they apprehended him, as a deserter. The question was, whether he was to be considered as a soldier?

Stands over to be spoken to, and *P.* to be let out on bail.

Lord *Mansfield*, C. J. said, that where an apprentice is enlisted without the consent of his master, upon a recent application by the master, and an affidavit of the fact, he, as Chief Justice, issues his warrant (in case the

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agt.  
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officer does not otherwise discharge him) to take the apprentice out of the hands of the military, and deliver him to his master. He said, he at first doubted of the propriety of the practice, but Lord *Hardwicke* told him, he had done the same, and had found precedents of the method being taken by Lord Ch. J. *Holt*. But it did not appear, that any body besides the Ch. Justice has granted such a warrant.

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The KING agt. The BISHOP OF DURHAM.  
K. B.

The court will not issue a mandamus to a visitor, to hear a claim by a prebend to the profits of his stall, during its vacancy.

1 Burr. S. C.

MR. *Willes* moved for a *mandamus* to the bishop, to proceed to hear the complaint of Dr. *Sterne*, one of the prebendaries of that church, who claimed the profits that had accrued during the vacancy of the prebendal stall: the dean, and chapter, having divided the whole amongst themselves. It appeared, plainly, that the bishop was visitor.

Mr. *Willes* said, that in the case of Dr. *Young* v. Dr. *Lynch*, *Pasch.* 26 *Geo.* 2., the court did not determine whether demands of this kind could be recovered in an action for money had, and received; and, therefore, he did not know how to advise Dr. *Sterne* to pursue that method.

Lord *Mansfield*, C. J. observed, that the statute 28 *H.* 8. ch. 11., extends only to sole corporations, in which case the profits accruing during the vacancy, are to be preserved for the successor. That, if Dr. *Sterne* had a right to this money, he might recover it in an action for money had, and received, &c.



And *Denison*, J., said, that the opinion of the court was so in the case of *Dr. Young v. Dr. Lynch*, though it was not directly given, as the other point was against him.

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agt.  
The Bishop  
of Durham.  
K. B.

Lord *Mansfield* said, as the other prebendaries had divided these profits, and some of them were dead, their representatives must be heard, and no visitatorial power of the bishop could extend to them. And the Dr. cannot prevent the chapter's calling the power of the visitor in question in the temporal courts, as was solemnly determined by Lord *Hardwicke*, 5 and 6 June, 1755, *ex parte Aubrey*. Where any fraud is practised by the chapter, a court of equity will make them account, as was the case of *Seager v. Dean and Chapter of Sarum*, where they divided, at an unusual time, just before he came to his stall, to prevent his having any thing.

The court discountenanced the motion so much, and pointed out such difficulties in it, that Mr. *Willes* waived it.

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CHALLONER *agt.* WALKER, and COLSON.  
K. B.

DEBT on bond.—The condition states, that *George Needham* died, seised in fee, and intestate, leaving *J. N.*, his son, and a widow. That the son sold to the defendants, but there being a doubt whether the widow was not entitled to dower, they retained £30 of the purchase-money in their hands, to indemnify them against any such claim. That the defendants afterwards sold to the plaintiff, and agreed to indemnify him against any such claim

Breach of the condition of a bond of indemnity against a claim to dower by a widow, her administrators demanding arrears.  
1 Burr. S. C.

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*agt.*  
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 and  
 COLSON.  
 K. B.

of the widow. The condition, therefore, was, that if they indemnified the plaintiff from any claim of dower then, or at any time thereafter, to be made by the widow, and of, and from, all suits, costs, and charges, in respect thereof, &c.: plea, that no claim of dower was ever made by the widow in her lifetime, but she married J. S., who, since her death, as her administrator, has brought a bill in Chancery for recovering the arrears of dower incurred in her lifetime, by which the plaintiff was made party to the suit; and obliged to put in an answer, and to expend £8 for costs, of which the defendants had notice, and have not repaid him, and so he is damnified.

To this the defendants demurred, and the plaintiff joined in demurrer: and now, upon argument, it was insisted by Mr. *Altham*, for the defendants,

1st. That the condition extends only to claims by the widow in her lifetime; and that conditions are to be construed in favour of the obligor. *Cro. Eliz.* 896. 2 *Saund.* 411. 1 *Ro. Abr.* 489. 426. pl. 6. 1 *Str.* 227. 1 *Lutw.* 536.

2. That the plaintiff had brought his action too soon, for he should have waited the event of the suit, as the bill may be dismissed with costs, and then no damage will ensue.

*Sed per curiam.* It is extremely clear, that this is a breach within the words, as well as the meaning of the condition; for the husband's claim is on account of the dower due to his wife.

2nd. The end of this bond was, that the plaintiff should sustain no damage on this account, nor be vexed with the

trouble, or expense, of defending the suit, nor lie out of his money necessarily expended on that account, till the cause is decided. *The plaintiff has a right to be indemnified de die in diem.*

Judgment for the plaintiff.

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WALKER,

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K. B.

The KING *agt.* The Justices of Peace of DERBY-SHIRE.—K. B.

MR. *Caldecot* moved for a *certiorari* to remove an order, made at the *general quarter-sessions* for the county of *Derby*, upon some persons who, a few years ago, were surveyors of the highways of *Norbury*, and *Repton*, to pass their accounts, and pay the balance in their hands to a person who is now surveyor. Highway-order removed by a *certiorari*.

The statute of 3 & 4 *W. & M.* s. 23., says, no *certiorari* shall issue to remove any order made on that act. But the order in this case is out of the jurisdiction of the justices, and, therefore, may be removed by a *certiorari*.  
1 *Hawk. P. C.*

1. The order should have been made at a *special sessions*.

2. Before the surveyors go out of office, they are to pass their accounts, and pay the balance in their hands to the succeeding surveyors; whereas, here the order is made after they are out of office, and the money ordered to be paid to a person who was officer two or three years afterwards.

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The KING

agt.

Justices of  
the Peace  
of Derby-  
shire.

K. B.

Rule granted, to shew cause why the *certiorari* should not issue.

The order being brought up, the two objections above mentioned were taken to it, and, in *Hil.* term, 1759, upon cause being shewn, a rule was made to quash it upon the first objection; for though the parties all applied to the quarter-sessions, yet that did not give that court jurisdiction.

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The KING agt. NORRIS, and others.—K. B.

An informa-  
tion granted,  
for a com-  
bination to  
fix the price  
of salt.

THIS was a motion for leave to file an information against the defendants, who were separate proprietors of salt-works in *Droitwich*, for a conspiracy to raise the price of salt there, by entering into an article, whereby they bound themselves, under a penalty of £200, not to sell salt under a certain price, which exceeded the price then received for it.

The articles were now cancelled, and destroyed: but, notwithstanding that, the court were unanimous for making the rule absolute; and Lord *Mansfield* declared, that if any agreement was made to fix the price of salt, or any other necessary of life (which salt emphatically was), by people dealing in that commodity, the court would be glad to lay hold of an opportunity, *from what quarter soever the complaint came*, to shew their sense of the crime; and that at what rate soever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence, and ought to be dis-  
countenanced.

He mentioned an indictment, upon one of the last home-circuits, against the bakers of the town of *Farnham*, for such an agreement.

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The KING

agt.

NORRIS.

K. B.

N. B. In this case, the party applying for the information seemed himself to be in some respect faulty, and the application proceeded from a selfish motive. That was mentioned by Mr. *Ashurst*, for the defendants, and the case of *Rex v. Peach* (1 *Burr.*) was cited, but, in this case, that objection was not listened to.

*At Lincoln's Inn Hall—25th of May, 1758.*

*Ex parte CLARKE, et al.*

Or

*Ex parte MACKRELL, a bankrupt.*—CHANCERY.

A creditor of several bankrupts, for the same sum, having proved his debt before each commission, may receive dividends under all.

THIS was a petition from the assignees of a bankrupt, for the direction of the court, in what proportion they were to pay some particular creditors their debts.

The bankrupt, and three other persons, who were also become bankrupts, were the drawers, and indorsers, of promissory notes, and it was on account of those notes so drawn, and indorsed, by all the bankrupts, that the demands of the present claimants arose. They had proved their *whole* debts under each commission, before they had received any dividend under either of the commissions; but afterwards they received 7s. 6d. in the pound under one, and 1s. 6d. in the pound under another commission; and the question was, whether they should have a proportionable share of the other bankrupts' effects, having regard to the whole of their original debts, or only to what remained, deducting the 9s. in the pound now received?

Mr. *Sewell*, on the behalf of the other creditors under the two commissions, where dividends were not yet made, cited 2 *P. Wm.*'s 89, and 2 *P. Wm.*'s 407, and insisted,

that the holders of these notes ought only to have a dividend in proportion to what remained of their demands, after deducting the 9s. in the pound, which they had now received. But

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 {  
*Ex parte*  
 CLARKE.  
 {  
 CHANC.

Lord Keeper *Henley* said, The settled distinction is, that if a man has a right to come in under several commissions for the same debt, and proves his whole debt under each, *antecedent to any dividend received by him under any of the commissions*, he is entitled to receive a dividend under each commission, equal with the other creditors, until he has received the whole debt due to him under his bonds, bills, notes, &c. But if he has received any dividend under one commission, *before he proves his debt under another*, he can only prove his debt under such other for what remains due to him, after deducting the dividend received. The man has a clear right to come in under all his securities, till he receives 20s. in the pound; and there is no pretence for a court of equity to take from a fair creditor any legal advantage he may have.

This distinction was very lately solemnly settled in this court, in the matter *ex parte Harvey*.

And it was so ordered in this case.

*Trinity Term, 31st Geo. II. 1758.*

The KING *agt.* DAVIES.—K. B.

THE defendant was indicted, several years ago, for high-treason, in *London*, for diminishing the coin, and upon that indictment was outlawed; and being now in custody of the keeper of *Newgate*, he was brought up to the bar of this court, and arraigned upon the said outlawry. After this, and before he pleaded,\* Mr. *Whitaker*, of counsel with the defendant, took several objections to the proceedings.

An outlawry invalidated on errors in law assigned, cannot be annulled but by writ of error.

1 *Burr. S. C.*

1st. By the statute of 8 *H. 6. c. 10.*, and 10 *H. 6. c. 6.*, an interval of three or four months is required between the *teste*, and return, of the second *capias*. Here it is tested, 23 *Oct. 23 Geo. 2.*, and returnable the 15 *St. Martin*.

2d. Here is a discontinuance of process. After the return of the first and second *capias*, and before the *exigent*, there is an interval of a whole year, without issuing any process.

3d. The *exigent* is returnable 15 *Mart.* and tested *cro. Trin.*

4th. The outlawry is pronounced by Mr. *King*, the coroner, whereas, by the custom of *London*, (which the court will take notice of), the Lord Mayor is perpetual coroner, and *King* only his deputy, and therefore, the outlawry should be pronounced by the mouth of the recorder. *Cro. Jac. 521. 2 Ro. Abr. 805, 806.*

\* The court could not assign counsel, till he pleaded, but said, they would connive at the assistance Mr. *W.* gave the prisoner.



5th. The return should have these words, " according to the law, and custom of the realm ;" so is the form of the writ, and so *Dalton*.

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agt.  
DAVIES.  
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6th. As to the writ of proclamation. This writ was not given, in criminal cases, till after the revolution, 4 & 5 *W. & M.* c. 22. Here the writ is tested, and returned, the same day, whereas, a larger space of time should, by that statute, have intervened.

7th. The return is only general, that he was proclaimed according to the form of the statute ; whereas, Mr. *Dalton* says, he should set forth particularly the day, and place.

8th. The prisoner was abroad, before the exigent was awarded.

Lord *Mansfield*, C. J., said, he thought some of these objections had weight ; and, therefore, the attorney-general should be spoken to, to consider whether he would confess the errors in fact, assigned ; those in law he cannot admit.

*Foster*, J., said, some of the objections, if well founded, may, perhaps, be taken advantage of, without a writ of error ; as, in that case, the outlawry is a nullity.

The prisoner was remanded to *Newgate*, and ordered to be brought up again in a few days : and the attorney-general to be, in the meantime, consulted, whether he would admit the errors in fact.

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 agt.  
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 K. B.

The prisoner being brought up again, Mr. Attorney-General attended, and said, he thought some of the exceptions, as to errors in law, were fatal, particularly the 1st, and the 6th, (as to the return of the proclamations). But though that is so, and the outlawry void by the statute, yet it must be avoided by writ of error. *Plow.* 137. *Hob.* 166. 2 *Hawk.* P. C. 306. s. 127.

As to the error in fact alleged, viz. that judgment should have been given by the Lord Mayor, the attorney-general said, that, in order to expedite the matter, he might confess that, and so have the outlawry reversed; but as it was said, the objection was not founded in fact; and as it might possibly affect other judgments, he declined confessing it.

Lord Mansfield, C. J.

By authority from the crown, the attorney-general may confess a false fact, and that was done in Lord Griffin's case; but an error in law he cannot confess.

Foster, J.

I remember the case of one Mr. Stafford, who was outlawed, and brought a writ of error, and assigned error in fact, that he was a yeoman, and not an esquire, as called in the indictment, and the attorney-general confessed the error.

Prisoner remanded to *Newgate*, and to bring his writ of error.

The KING *agt.* MARTHA GREY.—K. B.

THE defendant, one of the gate-keepers of *Richmond-park*, was indicted, at the last *Kingston assizes*, on an indt. for a nuisance in obstructing a common footway through the park, &c.; commodious step-ladders have been since put up. The prosecutor was satisfied with the ladders, and did not press a large fine, provided the defendant would go before the Master, and make the prosecutor a satisfaction for his expenses, &c. The defendant declined this.

The compliance of a party convicted of a nuisance, with the prosecutor's proposal for payment of costs, goes in mitigation of a fine.

Mr *Knowler*, and Mr. *Howard*, insisted, for the prosecutor, that the subject had a right to pass upon the ground, and, therefore, the nuisance was not, in fact, abated; and a writ lies to the sheriff to abate it, which can only be done by pulling down the park-wall. They further insisted, that, if the defendant would not go before the Master, the court ought to set such a fine, as that the third part may be sufficient to reimburse the prosecutor his costs; and cited a case, in this court, about nine years ago, *Rex v. Dykes*, which was an indictment, in *Wiltshire*, for a nuisance in removing a foot-bridge. The defendant was convicted, and the fact was, no more than removing a plank that lay over a small brook, and putting two stepping-stones in the room of it: the defendant was obstinate, and would not go before the Master: and *Lee, C. J.*, said, that where such prosecution was on behalf of the public, the court was, in a manner, bound, *ex debito justitiæ*, to see, that parties prosecuting for the sake of the public, should not be out of pocket, and accordingly fined the defendant £200.

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 GREY.  
 K. B.

This application was vehemently opposed by Sir *Richard Lloyd*, and Mr. *Norton*, for the defendant; and they mentioned cases where the court had refused to enhance the fine on the prosecutor's account; and attempted to shew, that this was a case of that sort, and to impute the delay, and extraordinary expense, in carrying on this prosecution, to the prosecutor.

The matter now stood over, for the court to consider.

Afterwards, in *Michaelmas* term next (32 *Geo. 2*, 1758), Mr. *Howard* informed the court, that the prosecutor's expenses amounted to £180; and, therefore, he moved, that an exemplary fine might be imposed, in case the defendant still refused to go before the Master.

The court said, if the defendant went before the Master, it would go in mitigation of the fine, but they should direct nothing about it; and *Foster, J.*, said, that the old way was, for the defendant to move for leave to talk with the prosecutor, as a favour, and that was the best way.

After much hesitation, the defendant's counsel agreed to go before the Master.

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WILLIAM TITLEY agt. ABRAHAM FOXALL.  
 C. B.

In a plea of justification in trespass, TRESPASS for assaulting, beating, wounding, and evilly treating, the defendant, and imprisoning him at *Shrews-* under process of a court constituted by letters patent, profert of them needs not be added, nor the proceedings pointed out minutely; and *molliter manus* answers the battery. *Willes, S. C.*

*bury*; and him there in prison detaining, and keeping, without any probable cause, and against the laws, and customs of the realm, and against the will of the said *William*, for a long space of time, to wit, the space of twelve hours; and until the said *William* had paid great sums of money to procure his release, and discharge, from that imprisonment, and until the said *William* had delivered up to the said defendant a note, under the hand of the said defendant, for the sum of £20, payable to the said plaintiff. There was a second count in the declaration for another assault, battery, wounding, and false imprisonment.

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agt.  
FOXALL.  
C. B.

The defendant pleaded, as to the assaulting, *beating*, evilly treating, and imprisoning, the said *William*, at the said first time, when, &c., and detaining him in prison, for the space of twelve hours, in the said declaration first mentioned, and above supposed to be done by the said defendant; the said defendant saith, that the aforesaid *William* ought not to have his said action, thereof, against him, because, he says, that the said town of *Shrewsbury* aforesaid, in the county of *Salop*, is an ancient town, and borough; and that the freemen, and burgesses, of the said town, and borough, from time whereof the memory of man is not to the contrary, until the 16th day of *June*, in the 14th year of the reign of the late King *Charles* the 1st, were a body corporate, and politic, in deed, and name, by various names of incorporation; and that the said late King *Charles* the 1st, by his letters patent, sealed with the great seal of *England*, bearing date, at *Westminster*, the same day, and year, last-mentioned, granted, for himself, his heirs, and successors, that the freemen, and burgesses, of the said town, should, from thenceforth, be one body corporate, and politic, in deed, fact, and name, by the name of the mayor, aldermen, and burgesses, of the

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town of *Shrewsbury*; which said letters patent, afterwards, to wit, on the same 16th day of *June*, in the 14th year aforesaid, at *Shrewsbury*, aforesaid, were duly accepted by the mayor, aldermen, and burgesses, of the said town of *S.* And the said defendant further saith, that the said late King *Charles* the 1st, in, and by, the said letters patent, of his special grace, and of his certain knowledge, and mere motion, for himself, his heirs, and successors, did (amongst other things) grant, that the mayor, aldermen, and burgesses, of the town aforesaid, and their successors, from thenceforth for ever, might have, and hold, and should have, and hold, within the town aforesaid, in the guildhall of the same town, or in any other convenient place within the said town, before the mayor, and recorder of the said town, for the time being, or either of them, a court of record, upon *Tuesday* in every week throughout the year; and that they might hold, by plaint, in the same court to be levied, all, and all manner of actions, suits, and demands, of all, and all manner of trespasses, and pleas upon the case, arising within the town aforesaid, and the liberties thereof, to be heard, and determined, before the mayor, and recorder of the said town, for the time being, or either of them, as by the said letters patent, remaining upon record in the court of *Chancery* of the lord the now king, at *Westminster*, aforesaid, (amongst other things) more fully appear. And the said defendant further saith, that before the said first time, when, &c., to wit, at the court of record of his said present majesty, held in the guildhall in, and for the said town of *S.*, in the county of *Salop*, within the jurisdiction of the said court, on *Tuesday*, the 8th day of *June*, in the year of our Lord 1756, before *Edward Blakeway*, esquire, then mayor of the town of *S.*, and a judge of the said court, by virtue of the aforesaid letters patent, the aforesaid defendant came into the said court in his proper

person, and then, and there, in the same court, levied his plaint against the said *William*, in a plea of trespass upon the case, to the damage of the said defendant of £20, for a certain cause of action, arising within the jurisdiction of that court, and then, and there found pledges in the said court, to prosecute his plaint, to wit, *John Doe*, and *Richard Roe*, and such proceedings were thereupon had in the same court upon the said plaint so levied as aforesaid; that afterwards, to wit, at the said court of record of the said lord the king, held at the guildhall in, and for said town of *Shrewsbury*, in the said county, within the jurisdiction of the said court, on *Tuesday*, the 15th day of *June*, in the said year 1756, before the aforesaid mayor, then a judge of the said court, there then issued out of the said court, at the instance of the said defendant, in the plea of the said plaint, a certain writ of *capias*, directed to the three serjeants at mace of the town of *S.* aforesaid, and also to *William Haynes*, *Edward Hill*, and *Robert Phillips*, whereby our said lord the now king commanded them, and each, and every of them, that they, some, or one of them, should take the said *William*, if he should be found within the said town, or the liberties thereof, and him safely keep, so that they, or some, or one of them, might have his body before the mayor, or recorder, of the town aforesaid, at the then next court to be held in, and for, the said town, and liberties, on *Tuesday*, to wit, the 22d day of *June* then instant, to answer the aforesaid *Abraham* in the plea of the said plaint, to the damage of the said *Abraham* of £20; and that they, or some, or one of them, should have then there that writ, which said writ was then and there duly indorsed for bail against the said *William Titley* for £15 3s. 1d., according to the form of the statute in that case made, and provided; and which said writ, so indorsed afterwards, and before the return thereof, and before the said first time, when, &c., to wit, on the 19th day of *June*, in the year last

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aforesaid, at *S.* aforesaid, was delivered by the said *Abraham*, to the said *Robert Phillips*, named in the said writ, (who then was, and continually from thenceforth hath been, and still is, an officer, and minister, of the said court), in due form of law to be executed; by virtue of which same writ, the said *R. P.* so being an officer, and minister, of the same court; and the said *Abraham*, in aid of the said *Robert Phillips*, and by his command, and as an assistant of the said *Robt. P.*, afterwards, and before the return of the said writ, to wit, on the 19th day of *June*, in the year of our Lord, 1756, at *S.* aforesaid, in the county aforesaid, and within the jurisdiction of the said court, *gently laid their hands upon the said William Titley*, in order to arrest him for the cause aforesaid, and then, and there, took, and arrested, the said *William Titley*, by his body, for the cause aforesaid, by virtue of the said writ, and detained him under that arrest, for the space of twelve hours, for want of bail for his appearance, as it was lawful for them to do. And the said *Robt. P.* afterwards, at the said then next court, held on *Tuesday*, the 22d day of *June*, then instant, in the guildhall in, and for, the said town, and the liberties thereof, before the said mayor, then a judge of the said court, returned the said writ in all things served, and executed, which is the same assaulting, *beating*, evilly treating, and imprisoning, the said *William Titley*, and detaining him in prison, whereof the said *William Titley* first above complains against the said *Abraham*, and this he is ready to verify; wherefore, he prays judgment, if the said *William Titley* ought to have his said action thereof against him, &c. And as to the residue of the said trespass, in the said declaration above supposed to be done, the said *Abraham* says, that he is not guilty thereof, and of them he puts himself upon the country, and the said *William Titley* doth so likewise.



To this plea the plaintiff demurred, and shewed for causes of demurrer, that the defendant had not made any profert of the letters patent of the late King *Charles* the 1st, set forth in the said plea, as he ought to have done; and also, for that the said plea is repugnant, uncertain, and wants form.

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The defendant joined in demurrer.

Serjt. *Poole*, in support of the demurrer.

There are several objections to the defendant's plea.

1st. The want of a profert of the letters patent; and that is assigned for cause of demurrer.

2d. The want of setting forth a summons.

3d. It is not sufficiently alleged, that the cause of action arose within the jurisdiction of the court.

4th. A battery is alleged, but not sufficiently justified in law.

As to the first: wherever a party entitles himself by a deed, or letters patent, he must bring them into court, that the court may judge of them. That this is so, appears by the statute of Queen *Anne*, for the amendment of the law, where it is said, that the want of such profert shall be matter of form only.

Indeed, where the deed, or letters patent, are enrolled in the court where the cause is commenced, there needs not be such profert; but, where in another court, it is otherwise. 2 *Salk.* 497.

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2d and 3d. As to the 2d, and principal objection, and the third, which I shall take together, because the cases I shall cite go to both, these are, in both cases, general averments, but that is not sufficient.

The plea only says, a plaint was levied, and such proceedings had, &c. There are many cases on this point, and, in some of them, *taliter processum* has been held sufficient; but, in later cases, in this court, the contrary has prevailed. *Moravia v. Sloper*, Trin. 11 Geo. 2. Comyns, 574. 1 Ventr. 320. *Murphy v. Fitzgerald*, determined, on solemn argument, in this court, in Trinity term, 1753, where the *taliter processum*, &c. was as in this case; and it was also alleged, that the plaint was levied for a cause of action arising within the jurisdiction, &c. But the plea was held bad in both points, and the court said, they could intend nothing in favour of inferior jurisdictions. It should have been here said what the cause of action was, saying it was an action on the case is not sufficient; it might be for a nuisance, or on a contract; whereas, it should be set out with such certainty, that the other party may know, with clearness, what the cause of action was, and have an opportunity to traverse it.

4th. As to the 4th point. There is no reason disclosed why the battery was committed. Every arrest, indeed, necessarily implies an assault, but not a battery; a battery cannot be legally committed unless the defendant makes resistance, or attempts to escape. 1 Lord Raym. 229, and *Williams v. Jones*, and another, Pasch. 9 Geo. 2, which last case, (though formerly the precedents were both ways) I apprehend, has settled the law in this matter. Lord Hardwicke there took time to look into the cases, but said, that unless he found the current of authorities to be too strong the contrary way to be resisted, he

inclined to think, the justification was no good answer to the battery. The cases cited in that case for the plaintiff were, Co. Ent. 303. *Thompson's* Entr. 316. 2 *Lutw.* 929. 3 *Lev.* 403; and, for the defendant, 2 *Lutw.* 930. *Salk.* 79. 1 *Saund.* 13. 3 *Salk.* 218. *Skin.* 387. On consideration of all which, the court held the plea insufficient; and, in *Trin.* 9 & 10 *Geo.* 2, Lord *Hardwicke* declared, that the court were all of opinion that it was not a good justification; but in order to make it so, an attempt to escape, &c. should have been shewed. That there was no case in the books to shew, a battery may be justified under a bare arrest. It was said at the bar, that every arrest is a battery; but the case cited to prove that, does not warrant the position. The intent of laying on hands is to be considered. 2 *Ro. Abr.* 546.

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Serjt. *Hewitt, e contr'*.

1. I allow my brother's rule, and principle, in some respect. If the party entitles himself under a deed which he has in his power, he must produce it: but if he does not claim the thing granted, but only under the person to whom it is granted, he needs not make a profert. *Bro. Monstrans* Pl. 125. 161. 2 *Bulst.* 228. *Style*, 192-3. 2 *Show.* 418.

The C. J. said, he need not labour this point, for it is clear. If the profert had been necessary, the other party would have been entitled to *oyer*, which he clearly was not of these letters patent.

2d and 3d. These are objections which have been often taken, and have anciently prevailed; but the law is now, with great propriety, altered; and, even in the case of a justification by an officer, this way of pleading has been

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allowed; *a fortiori* then, should it in the case of a party, who is a stranger to the form and course of proceedings, and has nothing to do but to enter his plaint, and the court is to do the rest. *Gwyn v. Paole*, 2 Lutw. 935, and the elaborate argument of Sir John Powell, in the same case, in the appendix to Lutw.: *Adams v. Freeman*, B. R. Easter Term, 26 Geo. II. 1753.

In the case of *Moravia v. Sloper*, the *capias* issued at the same court at which the plaint was levied, so that there could be no other proceedings but the *capias*.

The same cases also prove that the averring the cause of action, &c. to be within the jurisdiction is sufficient.

4. As to the assaulting, *beating*, &c. It is plain, from what Lord *Hardwicke* says, in the case of *Williams v. Jones*, that, if the plea had been a justification of the battery by *molliter manus*, &c. it had been good, and here it is so; and, therefore, if he had authority to arrest, this is a good answer to the battery. The case in 3 *Leo*. 403, seems to be good law, and in point; and the notice Lord *Hardwicke* took of that case, in the case of *Williams v. Jones*, shews, what the case then before him was, and that the *molliter manus* was omitted.

The case stood some days to look into the case of *Murphy v. Fitzgerald*, which the court had forgot; and on the 13th of *June*, in this term, *Willes*, C. J. delivered the opinion of the court in favour of the plea, and the defendant had judgment.

The KING *agt.* THOMAS LITTLE.—K. B.

THIS was a conviction of the defendant by a justice of the peace, grounded on the statutes 8 and 9 *William 3.* c. 25; 9 and 10 *William 3.* c. 27; and 3 and 4 *Anne*, c. 4. The conviction stated: Informal conviction, being for trading as a hawker, &c. 1 *Burr.* S. C.

That the defendant, *J. L.*, after the 24th of *June*, 1698, viz. on the 24th of *October*, 1757, in the parish of *St. Mary*, in the city of *Lichfield*, was found offering to sale silk handkerchiefs, and trading as a hawker, pedlar, or petty chapman; and that the said *J. L.* did then and there offer to sell a parcel of silk handkerchiefs; and that the said *J. L.*, although required, did not produce a licence. That the said *J. L.* being asked what he had to say, why he should not be convicted, did freely and voluntarily confess, that he, the said *J. L.*, did offer to sell silk handkerchiefs to the said *T. P.* (the informer) in such manner as is mentioned in the aforesaid information, and that he had no licence for the selling thereof, and that the said *J. L.* did not pretend or allege that he was the real worker or maker of the said goods, or the child, apprentice, or agent, or servant, of any such worker. Whereupon I do adjudge that the said *J. L.* is an hawker within the statute; and that the said *J. L.* is guilty of the said offence, in the said information alleged, and that the said *J. L.* forfeit the sum of £12 for that offence.

This conviction being brought up by *certiorari*, and being in the crown paper,

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Mr. *Yates*, to quash the conviction, took two exceptions.

1. The information does not sufficiently describe the offence, so as to shew that the defendant was a hawker, pedlar, or petty chapman, or such other person, &c. as these acts require to have a licence.

2. The conviction is without evidence of the party's being guilty.

Under the first head he cited *Str.* 497. *Rex v. Chapman, Pasch.* 28 *Geo.* II. *Lord Raym.* 900. *Rex v. Burnaby*; in all which cases the convictions, though in the words of the statutes, were quashed; so is the case on the game acts, in proceedings on which the several qualifications must be set forth; the reason of which is, that the informer may not take upon himself to determine the law; nor these inferior jurisdictions do acts of oppression, and screen themselves under these general vague descriptions; and a strict hand is to be holden over these jurisdictions, as they are contrary to common right, and break in upon the trials by juries.

2. The only evidence is the party's confession, that he sold these handkerchiefs, but does not say he did it as a hawker, or pedlar.

Mr. *Luke Robinson, e cont.* relied on the generality of the words of the statute, hawker, &c. or other person travelling, &c. which being in the disjunctive, and no definition what constitutes a hawker, &c. the justice of peace has pursued the words of the statute, and shewn an overt act, viz. selling as a hawker, &c. *Lord Raym.* 581. *Str.* 608.

2. As to the evidence, the defendant confesses he did in manner charged, &c.

Lord Mansfield, C. J.

All convictions must precisely set forth such a case, as shews the party has been guilty of an offence within their jurisdiction; and I think the first exception in this case has great weight. To give the justice of peace jurisdiction, it was necessary to aver, that the defendant was a hawker, pedlar, or petty chapman, or other person travelling, &c. to shew he was a person required by these acts to have a licence; for the offence he is convicted of, is the not producing a licence. Now here it is only expressed, that he exposed to sale, *as a hawker*, but not that he *was* a hawker, which is the essence of the crime; and though the words "other person travelling," &c. come after a disjunctive, yet as there is no other definition what makes a hawker, they seem to be descriptive of one. I do not say the conviction should define what a hawker is, but it should be averred that the party convicted is a hawker, &c.

Denison, J.

There is no averment that he was a hawker, &c. and a person who is no hawker may trade *tanquam* a hawker. In the case of *Rex v. Gardiner (a)*, the defendant was convicted for keeping a gun, *being an engine to destroy the game*, but it not being also alleged, that he used it for that purpose, the conviction was quashed.

As to the evidence in this case, the defendant only confesses that he sold the handkerchiefs, but not that he was a hawker, &c.; nor does it sufficiently appear to my satisfaction, that he was so in fact, or needed a licence.

(a) Str. 1098.

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“ to distrain for the same, that then it shall be lawful for  
 “ the said *Thomas Lewis*, his heirs and assigns, to re-enter  
 “ on the said premises, and again to re-possess and re-  
 “ enjoy the same.”

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In *Michaelmas* Term, 1736 (three years' rent being in arrear) an ejectment was brought by the devisees in trust of the lessor *T. L.*; *under and by virtue of* 4 *Geo. II. c. 28.* whereon judgment was obtained by default, against the casual ejector, and possession delivered, by virtue of a writ of possession, on the 15th of *April*, 1737, and they have been in possession ever since.

The lessor of the plaintiff hath not since paid the arrears, nor filed any bill in equity. On the trial of this cause no affidavit was produced (made either prior or subsequent to the said judgment in ejectment), that there was no sufficient distress, nor any evidence given thereof on the trial.

*Mr. Nares, pro quer'.*

The general question is, whether this evidence is sufficient to prevent the lessor of the plaintiff from recovering in this ejectment? And this question divides itself into two others.

1. How the matter stood before the statute 4 *Geo. II.*?

2. Whether that statute extends so far as to bar the lessor of the plaintiff of any advantage under this lease?

As to the first question.—Under the proviso in the lease, there were three things for *Lewis* to prove:—1st, rent in arrear; 2dly, a demand of it; 3dly, that there was no distress:—and, as this was a condition to defeat an



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estate, in derogation of the party's own grant, the court would have held him strictly to prove those facts; and, if it had appeared, that a distress might have been taken, he could not have recovered.

What difference then does a judgment by default make?

If there is a judgment against *the casual ejector*, and an action is afterwards brought for the mesne profits, the lessor must prove his title on the trial; but, if the judgment had been against the real tenant, it is otherwise, 2 *Str.* 960.; and, if he is made a defendant, and does not confess at the trial, he is a party to the record, and as much bound as if he had defended.

If then this judgment did not affect the now lessor, but if he had, immediately after that judgment, brought a fresh ejectment, the other party must have proved these requisites which I mentioned, neither will this length of acquiescence (as it is less than 20 years) bar the lessor of the plaintiff. Twenty years is the time which the statute of limitations has fixed, and a month taken from the end thereof is as material as five years, or more.

As to the 2d question. The statute of 4 *Geo.* II. intended to remove out of the way the niceties of re-entries, demands, &c.; but did not intend to break in upon the agreement of the parties, or take away the terms they had stipulated upon. Suppose the right of re-entry, under this lease, upon this additional condition; if the landlord should give the tenant the best tree on his estate. This statute, surely, would not take away that condition. Suppose the rent was payable yearly by the lease, the act of parliament does not extend to make an arrear of half a year a forfeiture. On the other hand, if the rent was

payable monthly, the landlord might have entered without half a year's rent being in arrear.

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All these instances shew, that the act of parliament did not intend to vary the contracts of parties.

But supposing this was a case wherein the act of parliament intended to interpose, yet the requisites of that law must be complied with. In the case of a judgment by confession on a bond, there are instances where the court will put the party to prove his consideration. *Skin.* 586. If then the court will not presume every thing in favour of this judgment, the party relying on it should have shewed that it was regular. Suppose a lease was made for 1000 years, in consideration of £20,000, at 20s. per annum rent, and judgment by connivance, &c. against the sub-tenant; yet shall the court presume, there was no distress? This statute is very penal, and excepts not infants, nor any body else, and yet takes away all remedy both at law and equity; therefore it should be construed favourably for tenants.

Mr. *Morton* was going to argue on the other side; but the court, being clearly of opinion with his client, stopped him.

Lord *Mansfield*, C. J.

The case is very plain. The single question is, whether we are, from what is stated, to presume the judgment against the casual ejector was irregular.

Most clearly we cannot; for, besides the general presumption, that, at so great a distance of time, *omnia presumantur solemniter esse acta*, it is also found, that this was a proceeding under the act of parliament. If that is

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so, there must have been the affidavit the statute requires. The case does not find, there was no affidavit, but only that it was not produced; and there is nothing to create a presumption that there was none, but all presumption is in favour of the judgment.

The legislature meant that tenants should not lie by for more than three months, but that, after that time, the landlord might build, or improve, on a certainty (though indeed, without the aid of this act, if a man stands by, and sees another lay out a large sum on an estate, thinking it to be his own, a court of equity will not endure the other to claim it). As to collusion between landlords and undertenants: if such a case should happen, there are principles enough in *Fermor's* case to get at them; covin, like poison, infecting all it mixes with.

There are no precise bounds to general presumption, as a head of evidence, and it depends on the circumstances of the case: therefore, less than twenty years may, in some cases, be sufficient to raise a presumption that a bond is discharged; in other cases more than twenty years may not have that effect. So, as to an old deed of thirty years standing proving itself, it is a pretty general rule; but still if the deed is material, and the witnesses alive, and easily to be come at, it may be necessary to produce them.

Presumption differs widely from a bar under a statute of limitations; for when a positive law has drawn the line, it must be adhered to.

*Denison, J.*

Here is a judgment against the casual ejector: shall we say it is irregular after this length of time, and when nothing is stated to shew it so?

*Foster, J.*

Supposing this judgment was irregular, yet while it remains unreversed (which is the method the act of parliament prescribes) it shall bar the tenant. But here even nothing irregular appears.

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*Wilmot, J.* of the same opinion; and added, that, under these provisoes for re-entry, the confession of lease, entry, and ouster, takes away the necessity of an actual entry, though an actual entry is necessary to avoid a fine.

Judgment for the defendant.

GOSS *agt.* WITHERS.—K. B.

THESE were two actions on two policies of insurance between the same parties: one on the ship, apparel, &c.; the other on the goods on board the same ship, on a voyage from *Newfoundland* to her port of discharge, &c. The insurance was against all common perils, &c.

A ship being taken by the enemy, it is immaterial between insurer, and insured, that the capture is complete *secundum jus gentium*: a total loss having occurred, and the object of the voyage been frustrated, after a recapture, the assured may abandon it, and claim for the whole.  
2 Burr. S. C. Park on Ins.

On the trial of the causes, at the sittings at *Guildhall* after last *Hilary* Term, the following special case was reserved.

That the ship sailed from *Newfoundland* in *October*, 1756, and, on the 31st of *December*, was taken by a *French* privateer, who took out her master and all her able hands; leaving only an apprentice, and landman, on board, and put a crew of *Frenchmen* into her, who continued eight days at sea, making for one of their ports, when the ship was re-taken by an *English* privateer, and brought into *Milford*

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*Haven.* That, before the *French* took her, she had been constrained to throw one quarter of her lading overboard in a storm. That on her arrival at *Milford*, and notice to the owners, they immediately gave notice to the insurers, and abandoned all claim, &c. to them, and now brought their actions on the policies for a total loss. It was near a month from her being taken by the *French* to her being brought into *Milford Haven*; and her cargo, being fish, was spoiled.

1st Question,—Whether this capture was or was not a total loss, so as to make the insurers liable?

2d Question,—Whether, on the circumstances of this case, the insured had a right to abandon, &c. to the insurers?

Mr. *Morton*, *p. quer.* took the affirmative side in both questions.

As every determination of a new point in commercial matters becomes of the most extensive consequence, and, therefore, deserves the greatest consideration before it is established; I hope this case will fall within the determination of former cases, and on such principles as all writers on the subject agree in.

Controversies between the insurer and insured materially differ from those between owners and re-captors.

In the present case the question arises merely on a contract between the insurers and insured; and whether there has been a sufficient breach of the condition to entitle the latter to a recompense, is the question. That here has been a capture, and a loss in consequence of it,

is certain; but whether it be a capture within the legal sense of the word, so as to be considered as a total loss, is a matter disputed.

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1. What an insurance is.
2. The most rational rule what a capture by an enemy is.
3. What the contract between the parties in this case imports.

1. Each party has his hopes, that the ship will arrive in safety; the insurer, that he may have no damage to make good; the insured, that they may have further advantage by disposing of their cargo at the proper market, and take in a new one, &c. *Bynkershoek*, Lib. 1. c. 21.

2. It is a principle not to be disputed, that when the capture, either from length of time, or the station she is in, is lost, without any reasonable hopes of her being re-taken, the property is altered, and there is a total loss. These hopes must have a reasonable foundation, and not the vain wishes of insurers, who will never fail to hope she will be re-taken. *Grotius*, *de jure*, &c. Lib. 3. c. 6. p. 814. Being carried *infra præsidium*, or taken by a single ship and brought *infra classem*, are clearly such captures as work an alteration of property as between the insurers and insured. And as to length of time only (without those other circumstances) *Grotius* holds twenty-four hours to be the period; and though that be disputed by other writers, yet, as, in reason, length of time ought to work such a change of property, there is a necessity to draw the line somewhere; and where will you stop? if not at twenty-four hours, why at double that number, or

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any other greater time? Here was no room for a reasonable expectation of her being re-taken. All her useful hands were taken out, and carried to a *French* prison; and the ship herself lost to the owners to all intents and purposes for near a month, and then brought into a port the most distant from the residence of the owners, and with perishable commodities on board. How could there be a more complete breach of the condition? The whole scheme of her voyage was utterly defeated.

3. As to the owners' right to abandon her to the insurers in these circumstances, it is no more than exercising their right of election, whether they would come in as for an average, or a total, loss, which they had a right to make, and is not abandoning a ship absolutely when there was a possibility of saving her, but assigning their right in her to the insurers; and to this purpose there is the common covenant in these policies. *Molloy*, lib. 2. fol. 243. *Malynes, Lex Mercat.* 111. 115.

The present is as strong an instance of a total loss as could well be; the ship detained from the owners for near a month; all her hands taken out; so damaged in a storm as to be unfit for sea without refitting. In the mean time her cargo (consisting of fish) entirely spoiled, and, if they had not, the market for them was lost by this delay.

Serjt. *Davy*, *pro defend'*.

We agree, here has been a great loss sustained, but insist it was an average loss only, and have paid money into court to answer it.

The only question is, whether here was such a capture

as divested the property out of the owners; for, if so, we agree it must be a total loss.

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That something more than a bare taking is necessary for this purpose all writers on the subject do agree. The carrying *infra præsidium*, or into the enemy's fleet, are put for examples. That no length of possession alone would be sufficient, is what I contend for. *Assievedo v. Cambridge, Lucas*, 77. There, indeed, was no determination, and the matter stood over to be spoke to by common lawyers; but the court (says the book) said, it was plain, that the property was not altered by the taking; and Dr. *Henchman* cited a very strong case indeed of a re-capture after many years' possession.

*Bynkershoek*, lib. 1. c. 4. controverts the passage in *Grotius* as to the twenty-four hours' possession.

This case is not like those on gaming policies, that are merely on the voyage, and not on the goods, &c. *Pond v. King, Hil. 21 Geo. II. B. R. Depaiba v. Ludlow*, in C. B. *Fitzgerald v. Pole*, in *Dom. Proc.*

Here the loss of mariners, &c. might have happened by a mutiny, or a storm, &c. as well as by the enemy.

The laws relating to insurances (particularly the late act against gaming insurances) are very strict against abandoning in order to occasion a total loss, which would be an inlet to great frauds; and the policy of these laws is, that it shall never be for the advantage of the owners to sustain a total loss; but, if this doctrine of abandonment be allowed, they certainly will, *ex. gr.* if they are likely to come to a late market, and their cargo must remain on their hands or be sold under prime cost, they will contrive to sustain some partial loss (which they may easily



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do without fear of detection), and then abandon the whole to the insurers. So, where they have part of their cargo stolen from them, or wantonly thrown overboard (in which cases the insurers are not answerable), they would seek a partial loss, and then come on the insurers for the whole.

The insured have factors, &c. on board, and can dispose of what is left; but the insurers have nobody to take care on their account, in case of abandonment.

The insurers cannot compel the owners to abandon; nay, the owners may repair and refit at the insurers' expense, and thereby subject an underwriter to double the sum he has underwrote, *viz.* all that is laid out in repairs, and afterwards for a total loss.

This is sufficient to shew the inconvenience of suffering owners to abandon; and *Molloy*, and *Malynes*, are no authorities, and may be brought to prove either side of the question.

#### *Reply.*

The case in *Lucas* was argued only by civilians, and never determined, and the case cited by Dr. *Henchman*, is absurd.

Time alone, I agree, is not sufficient, but as a circumstance to shew that the *spes recuperandi* was gone.

The two first cases cited by the Serjeant were on questions of an average loss.

*Fitzgerald v. Pole* was clearly but a partial loss, as the ship had cruised two months of the six.

The Serjeant has not attempted to answer the argument as to the right of abandoning to the insurers on the circumstances of this case, but, with his drawn sword, cut up all abandonment.

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The owners cannot subject the underwriter to more than he underwrites for, on account of refitting, &c. without notice, and consent; neither can they abandon without notice. *Magen.*

Lord *Mansfield*, C. J.

This is a question of great consequence, and, there being no determinations in point, it must be spoke to again.

There may be cases of ships being in an enemy's possession for an immense while, and yet never condemned; as ships taken in the *East Indies*, or the register ship in the last war, and not condemned till brought into Europe.

The instances *infra classem*, &c. are only put as examples, what shall be said to be a carrying *infra præsidia* of the enemy.

The twenty-four hours alone may not be sufficient. Fleets may be parted by the night, and renew the fight, &c. The distinction taken by Mr. *Morton*, between disputes between insurer and insured, and between owner and re-captor, is just. As to the latter, the property is never altered *till actual condemnation*; but the owner is entitled, paying proper salvage.

Sir *Leol Jenkins's*  
cases as to  
this.

*Bynkershoek* is an excellent writer, and well worth the reading, particularly his first volume.

Stands for further argument.

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Mic. Term, 32 G. II.

This case was now again argued by Mr. Norton, *p. quer.*, and Sir Richard Lloyd, *p. def.*

Mr. Norton.

I am to maintain, that there has been, in this case, a total loss; and, if so, the insurer is liable for the demand in question.

The general rule, laid down on the last argument, was this, *viz.* "whenever a ship is taken by an enemy at war, and continues so long in the enemy's possession that the *spes recuperandi probabilis* is gone, it is a capture." And for this were cited Grotius, and Bynkershoek. But how long that *spes probabilis* continues, is not agreed.

Bynkershoek, and those who follow his opinion, say, that the ship must be carried *infra portum*, or *infra classem*, or *infra præsidia*.

Others go further still, and say that the ship must be sold, and the captor part with his interest.

But Grotius, and others with him, say, that the *spes recuperandi* is over when the ship has been twenty-four hours in the enemy's custody.

But I apprehend that no general rule is to be laid down.

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it of late, because, on declarations of war, acts of parliament have been made, settling the property of prizes, &c. The resolutions of the court of Admiralty will not be adopted here against the determination of the common law-judges; and though I should be sorry to see two clashing jurisdictions, yet, if that should be so, the courts of law will prevail.

The acts of parliament which I have referred to are legislative confirmations of my doctrine; for they give captures to the takers, but would have excepted ships taken from their own subjects, and afterwards re-taken, unless the property was gone before, by the capture by the enemy. 29 G. 2. c. 34.

If the ownership had not been lost, the parliament would not have fixed a certain proportion to be paid for salvage, but have ordered a *reasonable reward*, as the act of Queen Anne relating to wrecks; for one capture may cost £1000, and another but half-a-crown. But taking it that the property was gone, and all the unreasonableness vanishes; the parliament would not have taken away from the private owner his property arbitrarily, if it had not been lost before by such capture.

By those acts, on payment of one half, the former owner may claim at any future re-capture, and yet it will not be contended that their right continues to any distant period.

The statutes too call them *former owners*, &c. which shews their property is then divested; and that all the right they have flows from the bounty of parliament.

Great inconveniencies would arise from another construction. It would put an end to insurances; for no man

would ever insure, if the underwriters were not liable till the end of the war, or till the ship perishes, because the owner may have her again at a future re-capture, on payment of a moiety.

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On the other hand, if the insurer pays his money, he would stand in the place of the insured, if insured for the whole, if not then rateably.

This doctrine was allowed so late as C. J. *Lee's* time. *Str.* 1250.

What the question may be between an owner and captor is nothing to the purpose here.

2d. As to the right of abandonment.

The rule laid down, on the last argument, seems to be the right one; viz. that the assured has a right to abandon at his discretion, so as there be no fraud. And the rule ought to be so qualified, because the owner's people should use all industry to save the vessel, &c.

It comes then to the rule laid down by *Molloy*, lib. 2. c. 7. p. 278. and the author of *Lex Mercatoria*, part 1. p. 111. where it is said, that the owner may abandon an injured, perishable cargo, hurt by an embargo on the ship in port, to the insurer. This is that very case, in point of argument. As to the cases cited on the other side on the last argument. *Bond v. King*, 21 Geo. II. It was a total loss of the cruise. *Depaiba v. Ludlow, Comyns*, 1360. No question was there of the property; for a capture by a pirate divests no property.

*Fitzgerald v. Pole*. That was an insurance of a cruise. The only case remaining, which seems to shake the com-

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An immediate pursuit suspends the property from vesting. Suppose a fog or mist hinders the pursuit, shall those little circumstances vest the property? The thing is, if they are in a state of pursuit. No writer but *Bynkershoek*, in his *Quest. juris*, lib. 1. c. 6. and lib. 2. c. 7., says, that the single act of taking vests a property. Suppose a ship hears of a friend being taken, and immediately bears that way, and beats about, surely it is as much a state of pursuit, as if she had seen the other ship strike.

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In seas frequented by our cruisers, and men of war, there is a constant state of pursuit; they are always beating about to meet with the enemy.

A ship, indeed, is always liable to be re-taken; therefore, there must be a line drawn; but it cannot be at a certain *time*, that can do nothing. If a month, why not an hour? Therefore it must be something else.

The carrying it into a port, or fleet, cannot do, because it may be cut out of port, or taken by a superior fleet.

No rules have been laid down.

If they are taken in a sea, into which we seldom navigate, the bare apprehending is, I should think, sufficient.

The *spes recuperandi* is the criterion. A capture in our channel may be reasonably expected to be re-taken for more than eight days; but not so in an unfrequented sea.

Why shall not I hope to recover what every cruiser that goes out hopes to get?

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The voyage, in the present case, was in a sea we cross constantly.

The fact, therefore, of reasonable or not reasonable must be determined from the probability, the *sympliciter*, being first fixed by a jury: as in the case of a lord of a manor, the court is to determine on the reasonableness of it, but the value of the property to be first found by the jury.

The acts of parliament referred to determine as to the property.

(The C. J. said, he knew that the legislative acts of parliament adopted the rule in *Gr*

2dly. The right of abandonment, as applied in this case, is the most absurd thing imaginable.

There is some sense in abandoning when property is damaged, and they cannot agree as to the value. But it would be madness to insure, if the property might abandon, in case his cargo did not come to market, or his ship had not a quick passage, &c.

By the case of *Fitzgerald v. Pole*, I take it to be determined, that the existence of the ship, and not the loss of the passage, &c. is insured.

*Reply.*

There can be no pursuit without a particular description, and it would be an abuse of language to say, that a ship has been taken for eight days, another ship, which knows nothing of the capture, is in pursuit.



The *spes recuperandi* must be a *spes probabilis*: some exertion of the owner himself is necessary.

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Sir *Richard*'s argument proves too much. Some people might continue their expectation for eight months.

I admit Sir *Richard*'s instance of the fog, &c. for that would be a fresh pursuit within the sound reasoning of the case in the year book.

Towards the latter end of the term, judgment was given to the following effect, by

Lord *Mansfield*, C. J.

The questions made upon this case are :

1. Whether the capture was, or was not, such a loss as to make the insurers liable ?

2. Whether the assured had, in this case, a right to abandon ?

Though these are all the questions made on the case, yet in arguing upon it we are not confined to them.

The general question is, whether the plaintiff was, on the 18th of *January*, 1757, entitled to recover against the insurers as for a total loss, upon abandoning to them all right which he might be entitled to under a sentence of the Admiralty upon a re-capture? I say, upon the 18th of *January*, for then he had the first notice of the loss, and immediately gave the insurers notice, that he abandoned, &c. and, consequently, nothing that has happened since can prejudice such right, if any.

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There is one point which was laboured by the counsel on both sides, in their arguments at the bar, which we are all of opinion, on full consideration, was totally immaterial upon the present question between the insured and insurers, and that is, whether, by this capture, the property was transferred to the enemy, according to the law of nations? This question can never arise but in two instances: 1. Between the owner and a neutral person who bought the prize from the enemy. 2. Between the owner and a recaptor (here I speak of a re-captor generally, without considering such as are entitled to some share, under the laws of the state).

If an owner ransoms, re-takes, or escapes, the property is immediately re-vested in him; and, as to him, it makes no difference whether the enemy had or had not, by the rules of war, a right to her as a prize.

A prize is thus defined, according to the opinion of the best writers on the subject: "*Quæ ex hostibus capiuntur, et jure gentium statim capientium fiunt.*" But the capture is not perfect till the battle, and pursuit, are over. This definition is adopted by our prize acts, and maintained by Wood, in his comment on the *Pandects*, with great strength of argument, "*per solam occupationem,*" and no friend or fellow-soldier, &c. can take it from him: but though this be the definition upon the fact, yet writers and states have prescribed arbitrary rules of their own, and, therefore, it is no wonder we find such a contrariety of opinions among them where the subject is arbitrary.

Some have borrowed their definition from the *Roman* law of captives, brought *infra præsidia*, which has introduced a question of great uncertainty, namely, what shall

be termed a carrying *infra præsidia* at sea, answerable to that of the Romans upon land.

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The writers whom *Grotius* follows, and some states that have adopted his opinion, maintain, that twenty-four hours' quiet possession constitutes a capture. *Bynkershoek*, and several states that follow his opinion, deny that the capture is complete till her being brought into port, &c.

But these rules are quite uncertain.

I have taken the trouble to inform myself what was the practice of the court of *Admiralty* before the prize acts were made: and Sir *George Lee*, to whom I applied, informed me, that having searched the books of sentence of the court of *Admiralty*, he found that it had been held, that as between the owner and re-captor or vendee, the capture was not complete till actual condemnation; and in one instance, in *Charles II.*'s time, Sir *Richard Lloyd*, the then judge of the *Admiralty*, ordered restitution, after the ship had been fourteen weeks in the enemy's hands.

Another instance, as between owner and vendee, is cited in the case of *Assievedo v. Cambridge*, which happened in 1695, and though it is not so mentioned in the case, yet the reason for restoring her to the owner must be, because there had been no condemnation.

Whatever the rule may be between the owner and re-captor in favour of the former, the case, as between the assured and the insurer, is widely different, and it might be as well objected to one who sues the hundred on the statute

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of hue and cry, that the property of the goods he had lost had not been altered by a sale, &c.

By the capture the insurers became liable, though never carried into port; and though there may happen a recapture afterwards, that will not vary the case, nor make any difference, as to the contract by which the insurer agrees to run the risk, and indemnify the assured; and though the ship be never condemned, the contract is equally binding, *ex gr.* A ship may be taken by a commission from a foreign state, between whom and us there is no war, solemn or otherwise, and in that case there can be no condemnation: so in the case of pirates. Yet a capture, in either of these cases, is, as between the insurer and insured, the same as a taking by an enemy at open war, &c.

The point now in question does not appear to have been ever started before in the case of policies on a real interest, nor would it here, had it not been for the damage which the cargo sustained, while the parties were squabbling about it.

What gave rise to this question was the wager policies, because there the insured had no interest, so there could be no indemnity; and the only question was, whether the event had happened; and to determine this, it was necessary to set up something as making a total loss between third persons, though the ship was safe, in order to determine the question upon the wager: therefore, in the case of *Assievedo v. Cambridge* (as appears by a MS. note I have seen), the man of war who re-took her, offered to restore her to the owner upon reasonable salvage; but the insured having no property, the policy being interest or no interest, the question was, whether the wager was lost or not; that case was never determined.

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It is the better opinion of foreign writers, that when the ship is so far lost that the voyage is prevented, the assured may abandon, &c.; and there is no book, ancient or modern, but what allows the assured a right of abandonment.

The general rule, as to this matter, extends it to cases of arrest and embargo by foreign princes that are not enemies; but positive laws of particular states have circumscribed the general rule, and settled the time of continuance, &c.

All the arguments, when applied to the insurance on the cargo, hold still stronger—perishable in its nature—the voyage as effectually frustrated as if the ship had been wrecked.

No capture is so total a loss that it is impossible any thing can be recovered; she may be re-taken, and, be it at ever so great a distance, a right accrues to the owner, paying salvage according to the rules stated in the prize acts. But this possibility shall not suspend the right the assured has to recover on the contract, but he may abandon his interest in such possibility to the insurer.

Policies of insurance are in the nature of indemnifications, and to be liberally interpreted as such. There may be a capture with little or no prejudice, and there may be circumstances that make it only an average loss; as if the master immediately ransoms her and proceeds on his voyage, here the assured may elect not to abandon.

There is a celebrated French treatise, entitled *Usages and Customs of the Sea*, in the second part of which, c. 7. § 1. called *Guidon*, it is laid down, that, whatever

obstructs the voyage, so far as to render it not worth the owner's while to proceed, he may abandon, consequently, and come upon the insurer for a total loss.

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Of late, indeed, the privilege of abandoning has been restrained; and, therefore, that which, at the time it happened, was considered as a partial loss only, shall not, from any alteration of circumstances afterwards, be considered as a total loss, at the election of the owner.

But there is no danger of that sort in the present case: here the loss was at first certainly total, and what was afterwards recovered by the re-capture, might not (after paying salvage and other charges) perhaps be worth the freight, nor could be better disposed of than by immediate sale. Shall it be said, then, that the assured, in this case, shall not be at liberty to disentangle himself from this unprofitable trouble, and abandon his right to the insurer? Suppose a ship sunk and all the crew drowned, and afterwards she is, at a great expense, weighed up again, surely the assured may come upon the insurer for a total loss. So in the case of a capture, he abandoning all his right and interest upon a re-capture, &c. to his insurers. We are all unanimous in our opinion.

Therefore the *postea*s must be delivered to the plaintiff.

See *Hamilton v. Mendez, Trin. 1 Geo. 3.*

*Trin. T.* DOE, on the Demise of ODIARNE, *agt.* WHITE-  
 31 G. 2. HEAD.—K. B.

Deeds of lease and re-lease, and a fine levied in pursuance by tenant in tail, discontinued remainders in tail.

2 Burr. S. C. ON the trial of this ejectment at *Warwick Lent* assizes, 1757, a case was reserved, which states,  
 That *Timothy Stoughton*, the grandfather, by lease and release, on the marriage of his son *Anthony*, settled the premises in question (after other limitations) to *Anthony* for life, with remainder to his first and other sons in tail male, with remainder to *Anthony's* sister *Mary Odiarne*, in tail male, remainder to the right heirs of *Timothy*.

*Anthony* had issue one only son, *Timothy*, and died in 1737. *Mary Odiarne* died in 1735, leaving *Wentworth Odiarne*, the lessor of the plaintiff, her only son and heir. *Timothy Stoughton*, the grandson, died in *June*, 1753, with issue; having in his lifetime, by lease and release, the 26th and 27th of *January*, 1735, previous to and in consideration of his marriage with *Ann Samwell*, and of her marriage portion, conveyed the premises to *Sir Thomas Samwell* and *Thomas Samwell*, and their heirs, to the use of the said *Timothy* and his heirs till the marriage, and then to trustees for a term of 500 years, and then to *Timothy* for life, to the wife for life, to the first and other sons in tail, to *Timothy* in fee. In this release was a covenant from *Timothy* to the trustees, for levying a fine of the premises to the same uses. The marriage took effect; and afterwards, in the same *Hilary* term, a fine was duly levied, &c. with general warranty, &c. After *Timothy's* death his widow entered, and intermarried with the defendant.

The lessor of the plaintiff made an actual entry to avoid this fine, and is heir at law to *Timothy*, the conusor in the said fine.

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Verdict for the plaintiff, subject to the opinion of the court on this question,

Whether the plaintiff is entitled, by virtue of his remainder in tail, under the settlement by *Timothy*, the grandfather, notwithstanding the fine and warranty of *Timothy*, the grandson?

*Mr. Knowler, pro quer'.*

As the lessor of the plaintiff has made an actual entry, he has a clear right to recover, unless one of these two impediments stand in his way.

1st. A discontinuance. 2dly. The descent of a collateral warranty.

¶ If there was no discontinuance of the estate tail, the remainder is not divested; and, if that be not divested, the warranty, though it descended on the lesser, will not bar him.

1. I am to endeavour to shew, that this is no discontinuance. There are some conveyances, by tenant in tail, which absolutely bar the estate tail, and remainders; and others which only discontinue, and turn the remainders to a right; and the reason why the discontinuance is suffered in those cases is for the sake of the warranty, because an entry would destroy that.

A common recovery bars the remainders: a fine, or a



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feoffment, discontinues them; and because they operate by transmutation of possession, and pass a fee, which is a greater estate than tenant in tail could lawfully convey, in respect of the wrong done to the issue, and remainders, they are called a discontinuance. But conveyances which pass no more than the tenant in tail might lawfully convey, as a bargain and sale, lease and release, &c. work no discontinuance of the estate tail, or divesting of the remainders, but pass only a base fee, determinable on the death of the bargainor, &c. It is the doctrine of *Lit.* (which has stood uncontroverted for near 300 years), that a lease, and release, shall have the same operation with a bargain and sale; and though Sir *Francis Moore* is said to have been the first who used a lease, and release (which, I believe, is true), yet it is founded on *Lit.*'s position.

Considered, then, as distinct from the fine, the lease, and release, worked no discontinuance.

What effect, then, had the fine?

To make it a discontinuance a fee must pass by it; but here the freehold had before passed by the lease, and release; and the fine only operated to confirm the estate before conveyed, and enlarge it, and make it more durable, *viz.* till failure of issue.

A fine discontinues because a fee passes; but if any estate less than that passes, it is not so. So, also, of a feoffment and recovery.

The lease, and release, convey no more than he lawfully might. He might lease for a year, for that disturbed no right; then he might release to his lessee *all his right*, and what was that? Why, for his life only, so no

wrong to any body; and, the entail being spent, the remainder is now come into possession under the warranty bind; which is the second question.

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2. But the warranty cannot extend to it. A warranty never bars a *vested* estate in possession, reversion, or remainder; but they must be turned to a right. *Co. Lit.* 388. b.

Another reason why the warranty cannot bar is, because it no longer exists. It must depend on some estate of freehold; and if it be annexed to an estate for years, it is only a covenant; therefore a copyhold cannot be discontinued by surrender, because his estate cannot support a warranty. Here the warranty was built on *Timothy's* estate, which ceased on his dying without issue, and the plaintiff does not claim under, but paramount the estate of *Timothy*. I admit, this warranty appears to be collateral for that reason; but though collateral, yet it is in this case no bar.

*Ed. Seymour's* case, in 10 Rep. is precisely in point, and proves every thing I have said. That was upon a bargain and sale, this a lease and release, both which convey the same, *viz.* no more than the tenant in tail may lawfully pass. That they have the same operation, appears from the doctrine of *Lit.*, and the resolution of *Holt, C. J.* in *Machil v. Clark*.

Mr. *Caldecot, e contr'*.

This case is manifestly distinguishable from *Seymour's* case: there the bargain and sale was a year before the fine, and the fine does not appear to have been levied in pursuance of any covenant in the deed.

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I admit, if *T. S.* was not tenant in tail in possession when he levied the fine, that we have no title.

1. Let us consider the lease, and release, and the fine, as distinct conveyances.

2. As making one conveyance.

1. The tenant in tail had an undoubted right to settle this estate as he has done, had he suffered a recovery instead of levying a fine. This settlement was made in consideration of the marriage, and of an estate which the wife would otherwise have been dowable of.

Mr. *K.* agrees, that, had the fine been first, it would have had the effect we contend for; so if any estate of freehold passed by it. Now the lease, and release, passing no more than the party lawfully might convey, carry only an estate for life, and, consequently, the uses being declared to himself in fee till the marriage, he is immediately in again of his former estate tail, which merges this new estate for life, and then he had his old estate when he levied the fine.

Lord *Mansfield*, C. J., here interrupted him, and said, Though the lease and release conveyed no greater *indefeasible* estate than for his life, yet a *base fee determinable*, &c. passed by it, as has been held since *Machil v. Clark*, in many cases.

Mr. *C.* then contended, that, at all events, *Timothy* had an estate of freehold when he levied the fine, which is different from *Seymour's* case.

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surance. But how is the case here? The estate passes by the lease, and release, then follows the marriage, upon which *Timothy* took a bare estate for life, by the limitations of the release; and after that the fine was levied, which could not possibly discontinue the estate-tail, as he had then only an estate for life: and no estate can be discontinued, but one that the party holds *in right of another*; as 1st, the bishop, in right of his church: 2d, abbot, of his convent: 3d, husband, of his wife's estate in fee, before the statute restraining that: 4th, tenant in tail, in right of his issue: and none but these four can (in construction of law) make a discontinuance. Here the fine by tenant for life might *divest* the estate of the issue in tail, but could not discontinue it.

Lord *Mansfield*, C. J., and the whole court were unanimous, that these ought to be taken as making one assurance, and then the fine is clearly a discontinuance, and the remainder-man has no right to recover in this ejectment; and to consider them as having distinct operations, would be to defeat the manifest intent of the parties, as the fine would be a forfeiture of the estate for life, limited to the husband.

As to the point of the warranty, that need not be determined in the present case. If the lessor of the plaintiff thinks fit to bring his *formedon*, it will then come in question.

Whereupon the *postea* was ordered to be delivered to the defendant.

Afterwards, the case to stand for another argument in next term, when it was again argued by Mr. Serjt. *Hewitt*, *p. quer.*, and Mr. *Norton*, *p. def.*

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This, I apprehend, is the legal operation of the deeds considered severally; but I will now consider them as making one assurance. And, in order to do that more intelligibly, I shall take a short view of the principal cases as to this point.

*Cromwell's* case, 2 Co. 69. &c.: it is there laid down (*inter alia*) that each of the conveyances are to have an operation, and tend to answer the intent (that is, *the legal intent*), of the parties; therefore, in this case, the fine shall not operate to extinguish, or forfeit, the estate for life of Mr. S., but, to prevent *that*, they shall all be considered as one assurance.

2 Rep. 245.

2 Lev. 52., a case put in 4 Mod. 266., and reported in 3 Bulst. 250. *King v. Edwards*, Cro. Car., in which last case the feoffment, and fine, were, to some respects, considered as one assurance, and to some not.

1 Vent. 280. *Skin.* 35. 52. 71. 184. *Carth.* 24. S. C.

On all these cases this observation arises, *viz.* all the conveyances are never considered as one assurance, but to support a clear intention of the parties, and a *lawful intention*. But that fiction is never to take place to destroy the operation of a common law-conveyance, perfect in itself.

In this case there is no such intent to be answered. The intent here was not to *make a discontinuance*, it cannot be presumed; and if it was, yet that was not a lawful intent; because every discontinuance is a tort, and the judges will, if they can, give it another operation.

1759.

DOE

agt.

WHITE-  
HEAD.

K. B.

The court stopped Mr. *Norton*, who was about to argue on the other side, saying, that the Serjeant had argued so candidly, (as well as ably), that the authorities on both sides were before them.

Lord *Manisfield*, C. J.

The intention of the parties here plainly was to bar the estate tail, and remainders, and that was a lawful intention; for as Mr. *S.* was tenant in tail in possession, he had a power to make himself seised in fee.

Therefore this, at most, was only a wrong mode of doing it.

The whole of the uses in the release were meant by the parties to arise out of the fine, and they had no idea, that it would do without it. The lease, release, and fine, were intended altogether to fulfil the parties intention.

I would not have this case determined on such a legal nicety, or else the fine might have relation to the first day of *Hilary* term, and then it would be anterior to the deeds; but there is no occasion to support this case by such a refinement.

If they shall not all be considered as one conveyance, and the release as a declaration of uses, the first effect of this fine would be to destroy the estate for life, first intended to be raised by it, in favour of the conusor.

*Seymour's* case is not applicable. The bargain and sale there was an independent conveyance, without any view of the after-levied fine: here all was one agreement,

and all executory. If this case had been like *Seymour's*, I should have thought myself bound by the authority of that case.

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agt.

WHITE-

HEAD.

K. B.

The parties here had an intent to make the settlement good; that intent was a lawful intent; for it was for a tenant in tail to make the estate under his own power, though he may have blundered in the manner of doing it.

Were we, in all cases, to attend to the priority of all the several instruments in settlements, they might often fight with and destroy each other, and great confusion would follow; many family-settlements might, by that means, be overthrown.

*Denison, J.*

The whole was executory till the fine was levied, and, when that was done, the release was a declaration of the uses.

In *Seymour's* case the bargainee was, by the special verdict, found *scised* before the fine levied. Perhaps there (and I really think), if the fine had been levied *within the six months*, the estate would have passed by the fine. The nicety of that case entirely depends on the penning of the special verdict. Therefore I clearly think that case is nothing to the purpose.

As to the objection, that the fine with proclamations does not discontinue, there is no foundation for the difference.

*Foster, J.*

It was certainly lawful for Mr. S. to make the settlement on his marriage.

1759.

DOE

agt.

WHITE-  
HEAD.

K. B.

As to the objection to the fine being with proclamations, gentlemen would be better employed in settling difficulties, than in starting such questions, to unhinge the titles of all the estates in the kingdom.

*Wilmot, J.*

The deeds of lease, and release, with this covenant in the latter, are to be considered, I think, as a deed to lead the uses of a fine, and then the case is clear.

The principal act here is the fine (as that was most proper to carry into execution the intent of the parties), and the lease, and release, are as members to wait upon it,

*Postea* to be delivered to the defendant.

*Trin. Term,*  
31 G. 2.  
1758.

BRUCKLEBANK agt. SMITH.—K. B.

To unload  
the ballast of  
a ship in  
haven, into a  
hopper, that  
it may be  
conveyed  
out, and cast  
into the  
ocean, penal  
by 19 *Geo. 2.*  
c. 22.

2 *Burr. S. C.*

TRESPASS against the defendant, a justice of the peace, for breaking and entering the plaintiff's ship, then floating in the river *Tyne*, and taking an anchor. 2d count, For taking another anchor. The defendant pleaded *non culp.* On the trial at *Newcastle*, last summer-assizes, the jury found the defendant not guilty of all except taking the anchor in the first count, and, as to that, they found a special verdict, *viz.*

That the plaintiff's ship, called the *Leeds-Merchant*, being floating in the *Tyne*, a navigable river; the plaintiff caused three tons of ballast, belonging to that ship, to be cast out of that ship into another vessel, called a hopper, with



1758.

Serjt. Poole, *e cont.*

BRUCKLE-  
BANK  
agt.  
SMITH.  
K. B.

Here the words are express, and the negative *shall not*, takes away the right the subject had before. Even a prescription cannot stand against the force of them. *Co. Lit.* 115. Here may be a consequential damage to the river, by washing in with the tide.

Stands for another argument.

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In *Michaelmas* term, this case was again spoken to by Mr. Clayton, *p. quer'*: and Mr. Norton was going to argue for the defendant, but the court prevented him, being of opinion already with his client. They said the words of the act were express, and the plaintiff must not pretend to be wiser than the law. If his method, by the hopper, be an improvement, he must apply to the legislature to repeal the act, &c. As to moving it from one ship to another, that is not within the act, because not throwing away, but using the ballast, &c.

Judgment *pro def.*

1758.

**HENRY WRIGHT**, and Others, (Grandchildren of **HENRY RAYNEY**, deceased) *agt.* **PEARSON**, and Others.—**CHANC.**

*HENRY Rayney*, by will dated the 2d of *May*, 1737, devised to trustees, and their heirs, on trust out of the rents, &c. to raise £500, and interest, and pay it to, the plaintiffs, his five grandchildren, equally, at 21, with survivorship, if any die before, &c. and, subject to the said £500,

In a devise of a trust in fee, held not an use executed, &c. viz. "To *T.* for life, remainder to trustees, &c. remainder to the heirs-male of *T.* and their heirs, remainders over." *T.* takes an estate-tail. *Ambl. S. C.* and *Eden's Ca.*; and see *Rodney v. Prince*, *Esch.* 1780.

To the use of his nephew *T. R.* for life, (subject to his qualifying himself according to a proviso after mentioned,) remainder to trustees to preserve remainders, remainder,

To the heirs-male of the said *T. R.* and their heirs.

Proviso, that in case *T. R.* should die without issue-male of his body, living at his death, then the testator charged the premises with £100 a piece to his two nieces, if then living, at their respective ages of 21 years. If either die, her part to go to the survivor; and empowered his trustees, after the death of *T. R.* without issue-male, and out of the rents, &c., to raise, and pay the said £100 a piece to his nieces:—and subject to the said £500, and £200,

To the use of all and every his five grandchildren, or such of them as should be living on such failure of issue-male of *T. R.* to take as tenants in common, and to their respective heirs, and assigns, equally to be divided between them, share and share alike.

1758.  
 {  
 WRIGHT  
 agt.  
 PEARSON.  
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 CHANC.

Proviso, that *T. R.* should immediately on the testator's death, be placed apprentice to a surgeon, or some other good trade, for seven years, or else sent to *Oxford*, or *Cambridge*, there to continue till ordained, and in case of refusal or neglect, then the estate limited to him to cease and determine, and be void as if he were dead, and the estate from thenceforth to revert to such of the five grandchildren as should be then living, equally among them, and their respective heirs, as tenants in common.

The testator died in *February*, 1740. *T. R.* died in *August*, 1748, having suffered a recovery of this estate.

The plaintiffs, by their bill, insisted, that the freehold was vested in the trustees, till the £500 should be raised; and that, after payment thereof, *T. R.* was entitled to an estate for life only. That the £500 was not raised, and that the plaintiffs were entitled thereto, on the death of *T. R.* without issue-male.

The defendants insisted, that *T. R.* took an estate-tail under the will, which was barred by the recovery, and that they are his heirs, and as such entitled in fee.

Lord-Keeper *Henley*.

1 Qu. Whether *T. R.* took an estate in tail, or for life?

2 Qu. Whether the testator intended the issue should take as purchasers in fee, or in tail, under this will?

3. Whether the estate is a trust, or an use executed?

It has been said, it is an use executed, and that the trustees had only a chattel, *quousque*, &c. for which was

cited 1 *Williams*, 505. and 2 *Vern.* 403.; but these cases do not apply; for in both of them the estate devised was an uncertain interest, and therefore a chattel, but where it is certain, this court cannot declare it a chattel, or any other estate than what is devised. If lands are devised to *A.* for life, to pay debts, the court cannot construe it a chattel, much less when in fee; for it would be changing the trustees, contrary to the party's intent, which was, that the trust should be executed by the trustees, and their heirs, but such construction would make it be executed by the executors. *Carter*, 97. 107. To *A.* and his heirs till debts paid, is a fee simple, conditional, by Lord *Bridgman*. This reasoning is confirmed by Lord *Hardwicke*, in *Bagshaw*, and *Spencer*. Therefore, I am of opinion it is a fee in the trustees, not executed, by the statute of uses, to any of the subsequent takers. But I think this is not very material, for as the trusts are, by the will, fully limited, and declared, this court cannot put a different construction, than if it was a devise executed in a court of law. And I think it very dangerous to put a different construction on words of limitation, in cases of a trust, and a legal estate, except in cases where the limitations are imperfect, and something seems left to be done by the trustees, and by the court. Lord *Hardwicke* relied more on the intent of the testator, in *Bagshaw v. Spencer*, than on this distinction.

2. Here it is to be observed, that the testator is disinheriting his heir, in order to perpetuate his name, and his intent in this is clear, and yet they suppose he is giving a fee to the children, under which the daughters of a son might take, contrary to the intent. The intent seems to be to make a settlement of his estate, and what shews he intended to give a particular estate, and not a fee, is his

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agt.

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CHANC.

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WRIGHT

agt.

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CHANC.

limitation of a remainder in fee to his five grandchildren : this is the *cardo causæ*.

It has been objected, that, by the proviso, the limitation is confined to the issue male of *T.* living at his death. After the limitation of the estate for life, the next is to the heirs of the body, and then the proviso is added, but the proviso is collateral to the limitation, and breaks the thread of the limitation of the estate, which, after the insertion of this proviso, is again reassumed. It is objected, that the words, "*and for default,*" &c. relate to the issue male living at his death, and mentioned in this proviso. But I cannot think that a just construction of the will, according to the rule of criticism, and sense, for the thread of the limitation should not be interrupted, and then it stands thus : "To trustees and their heirs, &c. to raise, &c. ; " then to the use of *T. R.* for life, (subject to the placing him " out apprentice, &c.) remainder to trustees to preserve, " &c. remainder to the heirs of the body, and their heirs ; " remainder to the grandchildren, and their heirs, as tenants in common." And, by this construction, the words "*and for default,*" &c. will refer to the heirs of the body before-mentioned, and then the proviso will be detached ; and this seems to be the true, and rational, construction of the will ; for, it is absurd, if it be construed as limited to the issue-male living, &c. ; and, if the proviso be taken as in a parenthesis, it gives the whole will a sense agreeable to the testator's intent. The words are, as placed in this will, words of limitation, and not of purchase. Supposing the will had stopt at those words, it would have been an estate-tail, was admitted in *Shelley's* case : *Cart.* 170. ; and *Coulson v. Coulson* confirms this, with this distinction, that it separates the estate tail from the estate for life, by the intervention of trustees to pre-

serve, &c., a distinction without a difference. Several cases were cited in *Bagshaw v. Spencer*, where additional words of limitation were superadded to words of limitation, &c. which makes them words of purchase. But all were founded on the principles in *Archer's* case, where words of limitation were superadded to words of limitation, and being also in the singular number, they became a description of an individual, and so it would if it had been in the plural number. But in *Bagshaw v. Spencer*, by insertion of trustees to preserve remainders, the court held the word *heirs* a word of purchase: where the intent was plain and clear, he might make use of what words he would, for it has likewise been construed a word of limitation, and that was a case almost the same as this. Lord *Hardwicke*, on the circumstances of that case, and the limitation of the other moiety to the *Spencers*, and several other reasons, which shewed *the clear intent*, held it an estate for life in *Bagshaw*. He determined on the *intent* of the testator, and assumed no more power than every court of law has done. Here I proceed upon the same principles, and think that *T. R.* took an estate-tail, from the intent of the testator appearing on the face of the will; and that he did not mean by the words "*heirs of the body*," that they should take an estate in fee, is most clear, for then they must take as purchasers.

I was considering whether I could make this construction, *viz.* to *T. R.* for life; to the heirs of his body in tail; to his grandchildren. And if this limitation had been for default of heirs of the body, this might have done, and I might have considered it as heirs of the body of those mentioned before. But this limitation here is for default of issue *male*: and it would, in that case, have been the best construction, for here the words *heirs*, and *assigns*, are dropt as redundant, and surplusage. And though it is

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WRIGHT

agt.

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 agt.  
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a rule never to reject words if they can stand; yet, from the inaccuracy of wills, it often cannot be avoided; and in this case I must do it to support the testator's intent, consequently the recovery suffered by *T. R.* was good.

The KING agt. Dr. HENSEY.—K. B.

A prisoner's hand-writing allowed to be proved by witnesses who had seen him write; and sending intelligence to enemies, though intercepted, is treason.

1 Burr. S. C.

THE defendant was tried at the bar of *B. R.* for high treason, upon the statute of 25 *E. 3.* The species of treason were, 1st, Conspiring the king's death; 2d, Sending aid and comfort to the enemy.

The proof consisted of letters sent to him by his correspondents abroad, and drafts of letters which he had sent to them, giving an account of the *British* forces, destination of squadrons against *France*, &c. &c. recommending it to *France* to invade *England*, &c.

Mr. *Carrington* and others proved, that these papers were found in a bureau and beaufet in the parlour where the prisoner lodged. They proved, he had the use, and general custody, of them; but the maid-servant said, that she had at times (in the absence of the prisoner) seen her mistress, at whose house he lodged, unlock them. Then four witnesses were called to prove the letters to be his handwriting. Mr. *De Costa* had known him ten years, had often seen him write, and believed them to be his hand, &c. Three others spoke to their belief that it was his hand, &c. but did not appear to have so perfect an acquaintance with his manner of writing as Mr. *De Costa* had.

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 agt.  
 HENSEY.  
 K. B.

the court delivered that, with the book containing the treason, &c., to the jury, and ordered them, from comparing them together, to judge whether the book was not his hand, &c., though they had nothing but bare comparison to guide them, without having seen him write.

The letters were thereupon read.

Mr. *Morton* also objected, that sending these letters could not, with any propriety, be deemed either of the species of treason laid in the indictment. Mutiny act, 7 *Ann*, c. 4., by which a soldier's holding correspondence with the enemy, is declared to be treason, and 2 & 3 *Ann*., c. 20. § 34.

Mr. Solicitor-General, *e cont.*, cited *Hale*, H. P. C. 167., and 3 Inst. 14., and said, that this was solemnly settled by the opinion of *Holt*, C. J., and all the judges of *England*, in *Greg's* case.

The C. J. said, there was very little doubt in *Greg's* case, but that the sending intelligence to the enemy was an overt act of both these species of treason; but the principal question was, whether such intelligence being intercepted, &c., and never going to the enemy, was sufficient? and the judges were clear that it was. And as to the act of Queen *Ann*, 1st. It was only declaratory. 2. It was applied to soldiers who might be employed out of the realm, and there hold correspondence with the enemy; which, being out of the realm, could not have been tried here before that act, the statute of *H. 8.* not extending to it.

The defendant was found guilty; and on the last day of the term he was brought again to the



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 CHESTER-  
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 agt.  
 MIDDLE-  
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 K. B.

However, in this case, the court said, they might intend (from the penning of the act), that the practice was to proceed in the same court, in counties-palatine.

Rule for staying the proceedings made absolute, but without costs.

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*Michaelmas Term, 32 Geo. II. 1758.*

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The KING agt. PARRY and THOMAS.—K. B.

A *certiorari* issued to remove, &c. from great sessions.

THE defendants were indicted at the assizes for the county of *Carnarvon*, for a felony, in buying a small quantity of corn, which had been taken from ingrossers, though they swear they did not know it was feloniously taken.

Mr. *Norton* now moved for a *certiorari* to remove this indictment, upon a suggestion by affidavits, that they could not have impartial justice upon a trial there, so that it might be tried in the next *English* county. The affidavits stated several facts, to shew partiality in the gentlemen and freeholders of that county. 2 *Keb.* 681. 1 *Vent.* 146.

The court said, there was a later case in an indictment for murder, reported in modern cases in law and equity.

Rule *nisi*.

## ANONYMOUS.—K. B.

Undue means having been used to execute process, an attachment, not an information, held proper.

MR. *Morton* and Mr. *Nares* applied for leave to file an information against several persons for a misdemeanor. The fact was this: one of the persons complained of had a writ out of the C. B. to execute on *S. S.*, the daughter of the prosecutor, but, finding it difficult to serve her, they applied to a justice of peace for a warrant; under a pretence of some stolen goods being there concealed. By virtue of that, they entered the house, and arrested her, but never searched for the goods they had supposed to be stolen.

The counsel applying said, they moved this in order to punish the parties for their conspiracy.

But the court was clearly of opinion, that the proper way of proceeding was, to apply to the court of C. B. for an attachment, for making use of such undue means to execute the process of that court.

Motion refused.

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*agt.*  
 ROGERS.  
 K. B.

for form), but in order to rectify the mistake: but then it must appear, that somebody was aggrieved by such misconduct; and, upon such grounds, if it be doubtful, whether they have exceeded their power, or not, the court will, upon making such doubt appear to their satisfaction, order an information for the purpose aforesaid, and to hang over their heads till they have tried the civil right by feigned action, or otherwise.

But, in this case, the court thought the commissioners had done right, and the rule was discharged with costs.

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HAWKINS *agt.* BASKERVILLE.—K. B.

A writ issued before an affidavit filed, insufficient for holding to bail, under 12 G. 1. c. 29.

MR. Nares, a few days ago, obtained a rule to shew cause why the defendant should not be discharged upon filing common bail, as no affidavit of the debt was filed with the proper officer, previous to the issuing of the writ.

Mr. Gould now shewed for cause,—That an affidavit was, in fact, made in time, though not filed, by reason of the absence of the officer.

*P. cur.* The act is express, that the affidavit must be filed before the writ issues.

Rule absolute.

1758.

BURTON

agt.

THOMPSON.

K. B.

(though against evidence), no new trial could be granted. This is a suit of the same nature, and the plaintiff has brought it in *London*, at a distance from his own abode; and, therefore, as he has intrusted a *London* jury with the case, and they have given it against him, there is no pretence for the court to indulge him with a new trial, as he has sustained no damage, and granting it would not exempt him from paying the costs of this verdict; and he stands no chance for costs next time, should he get a verdict, for the judge says, that half a crown damages would have satisfied him. We are to see substantial justice done to the parties, but not to minister to their passions, or revenge; and this was resolved in *Mackrow v. Hull*, *Mich. 30 Geo. 2.*

Foster, J.

It would be intrenching too much on the province of the jury, to grant a new trial in every case of a verdict against evidence; it ought only to be allowed in cases of flagrant injustice: here half-a-crown would have been sufficient damages, in my opinion.

Rule for a new trial discharged.

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 ASLIN *agt.* PARKIN.—K. B.

An action for the *mesne* profits, may be brought in the name of the nominal plaintiff in ejectment, after judgment by default against the casual ejector. 2 *Burr. S. C.*

THIS was a case, reserved by the C. J., upon a point which arose before him in a cause at last *York* assizes.

The opinion of all the twelve judges was now delivered by

after judgment by default against the casual ejector. 2 *Burr. S. C.*

Lord *Mansfield*, C. J.

This was an action of trespass, for the *mesne* profits, and costs of an ejectment (as consequential damages), brought in the name of the nominal plaintiff in the ejectment, against the tenant in possession, after judgment by default against the casual ejector.

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*agt.*  
 PARKIN.  
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On the trial, the plaintiff proved the judgment by default against the casual ejector, and the writ of possession executed, and returned; he also proved the actual possession of the defendant, and receipt of the profits for part of the time comprehended in the demise stated in the declaration in ejectment, the value of the profits, and the amount of the costs. But they did not prove the plaintiff's possession at the time the defendant did the trespass.

On the trial, the defendant's counsel insisted, that, as this was a possessory action, the plaintiff should prove, that the plaintiff was in possession, when the trespass was committed. They said, there was a material difference between judgments against the casual ejector, for want of an appearance (which is this case), and judgments upon verdict against the tenant in possession, where the defendant has appeared, and entered into the common rule; and though the case of *Jefferies v. Dyson*, 2 Str. 960, carried it no further than that, in the case of judgments against the casual ejector, the defendant was at liberty to controvert the title in an action for the *mesne* profits, but not to controvert the possession; yet that both those resolutions had since been denied in a case 19 Geo. 2. in C. B. 2 *Barnes*, 367, where it was held, 1st, That the title could not be controverted, but, 2dly, that the plaintiff must prove his own possession: to this they added some circuit-traditions of plaintiffs being nonsuited on this point.

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 ASLIN  
 agt.  
 PARKIN.  
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 K. B.

At the time of the trial, on principles, I was clearly of opinion against the objection, and the jury accordingly found for the plaintiff; but, as precedents were cited, and for the sake of practice, I reserved the case, to take the opinion of all the judges upon it, without any delay, or expense to the parties.

Accordingly, on the first day of term, I proposed the question to all the judges, and they took till *Thursday* last to look into the cases, and not only printed, but MS. cases were produced of opinions both ways; but they are now of no consequence, as all the judges of *England* are unanimously of one opinion.

We are all of opinion that the nominal plaintiff, and the casual ejector, are fictitious characters, introduced merely for form, for the more effectual, and expeditious way of trying the title (without delay by special pleading, &c.), and do substantially, and, in fact, represent the lessor of the plaintiff, and the tenant in possession, they are substantially the parties. The latter must be served, and may set aside the proceedings for want of service, and cannot lose the possession without having notice, and means to defend himself.

There is no material difference, whether the judgment be by default, or after a verdict; in the latter case, the title is tried, and found against him; in the former, he confesses the plaintiff's title.

An action for the mesne profits is the consequence of the judgment in ejectment, which, as long as it stands unimpeached, is conclusive against the tenant in possession, and precludes him from controverting the possession of the nominal plaintiff. The lessor may bring

1758.

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agt.

ADAMSON.

K. B.

It is an act  
by *Robert Ca*  
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K. B.

1 *Str.* 441. *Bromley v. Fraser*, (he then stated that case).

Every inconvenience here stated holds in a very great degree, though not equally, as to inland bills, and all other arguments hold equally.

We are therefore all of opinion, that to entitle the indorsee of an inland bill to bring an action against the indorser, it is not necessary for him to make any demand of, or inquiry about the maker of the bill.

The law is the same, as has been solemnly settled, in the case of promissory notes, so far as they are analogous to bills of exchange, which will appear very clearly, as soon as the resemblance is settled.

A promissory note from *A.* to *B.*, at first bears no resemblance, but when it is indorsed, the resemblance begins. The indorser stands in the place of the maker of a bill of exchange, the drawer of the note in the place of the payer of a bill, and the indorsee of the note in the place of the payee: thus it becomes, to all purposes, a bill of exchange. The indorsee of such note is bound to apply to the maker, and must know where he lives, as he is the hand to pay the money; and before he brings his action against the indorser, he must prove a demand, or due diligence, to get the money from the maker of the note. This was solemnly settled by the court of C. B., 4 G. 2. as is cited by *Lee*, C. J., in *Str.* 1087.

What was said by Lord *Hardwicke*, in the case of *Richardson v. Mackrell*, in this court, *Mich.* 10 Geo. 2. (as stated on the argument, by my brother *Denison*), that the same law is in the case of promissory notes, and



The KING *agt.* MALLINSON.—K. B.

A conviction  
on 4 & 5 *W.*  
& *M.*, for  
killing fish,  
quashed for  
informality.  
2 *Burr.* S. C.

THIS was a conviction of the defendant, by a justice of peace for the West Riding of *Yorkshire*, for killing ten trouts:—penalty, 10s. each fish.

The conviction stated an information, that the defendant did the fact, and negatived as to him all the qualifications to kill hares, &c. Then states a summons to appear *immediately*. That the defendant neglected to appear. That three weeks afterwards, without any other summons, the justice examined a credible witness, who proved the fact, and swears as to the qualifications in the words of the information, and thereupon the justice convicted him.

Mr. Norton, for the defendant.

In the case of orders, the court intends every thing to support them, but in convictions nothing.

Objections. 1st. The summons needs not have been set forth; but, as it is set forth, it is bad. It was unreasonable to require his *immediate* attendance; his witnesses might live at a distance, &c. This kind of objection was taken in 1 *Str.* 261, and the answer there given does not occur here.

2dly. By the case of *Rex v. Jervis*, *Hil.* 30 *Geo.* 2., and other authorities, in convictions of this kind, the justice must, in his *adjudication*, negative all the qualifications to kill game, as to the party convicted. Here it is not

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The KING

agt.

MALLIN-  
SON.

K. B.

Lord *Mansfield*, C. J.

The offence, in the act of *W. & M.*, is killing, which must mean *stealing*. Here it might be in his own pond, which is no offence.

The recital of the qualification of the game laws, was nothing to the purpose.

*Foster*, J.

The offence intended to be guarded against was, the invasion of another man's property.

*Per totam curiam*. It is bad throughout in many places.

Conviction quashed.

The KING agt. FIELDING, Esq.—K. B.

An information against a justice of peace refused, till an action for the same offence is discontinued.

2 Burr. S. C.

THIS was a motion for leave to file an information against the defendant, for some misdemeanor supposed to be committed by him in his office of a justice of peace for *Westminster*. The prosecutor had also commenced an action against him for the same offence.

Serjt. *Davy*, coming to shew cause for the defendant, insisted, that the prosecutor's counsel should make their election, whether they would proceed in their action, or in this criminal manner, before he produced any affidavits

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A verdict found generally against a defendant in trespass, held sufficiently expressive of opinion in respect of a pleaded justification.  
2 *Burr.* S. C.

**ERROR** from *Ireland*. Action of assault, battery, and wounding, with a loss of the plaintiff's left hand, and arm. As to the *vi et armis*, the defendant pleads not guilty. To the residue, *son assault demesne*. Replication, *de injuriâ suâ propriâ, absq. tali causâ*. Issue. On the trial, the jury found the defendant, generally, *guilty*, and gave £850 damages.

Mr. Nares, *pro quer'*, in error.

There is no finding at all on the material issue, or, if there be, it is argumentative only, and not so complete as that judgment can be given on it.

Consider what a verdict is. (Vide *Heath's Maxims*.) Here the questions are two. The verdict completely answers the first, but does not answer the question proposed by the 2d issue. The defendant there owns the beating, &c., but says, the plaintiff was the aggressor. As to that fact, the jury have determined nothing. It was necessary that fact should be found, for the verdict would be nugatory without it. *Sty.* 150. 210. 1 *Sid.* 341. *Gillb. Hist. of C. B.* This verdict is not aided by any statute. *Sty.* 167.

The verdict ought to have been, "Not guilty, as to the first; and, as to the second, that the defendant, without any such cause, &c. beat the plaintiff." *Lilly's Ent.* 516.

Mr. Ashurst, *e contr'*.

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But, if the court can make the verdict good, and have no doubt of the meaning of the jury, they will, as far as they can, aid mistakes of the officer, as this plainly was.

I have no doubt of the justice of the case. The jury have found the defendant guilty of the *trespass*, which negatives the justification.

*Denison, J.*

The court will never award a *venire de novo* but where the verdict is so uncertain, that they do not know what the jury meant; and, if they do it in other cases, it is erroneous.

Here the court can have no doubt, but the jury meant to find for the plaintiff on the whole record.

I remember a case, in which I was of counsel in this court, when Lord *Hardwicke* sat here, *Adlam v. Tow*, 11 *Geo. 2*. It was on a writ of error, out of *Stepney*-court, in an action of *assumpsit* for work done. The defendant pleaded in abatement, that the cause of action did not arise within the jurisdiction. Issue thereon, and the jury found, "*Assumpsit, modo, et formâ.*" The court seemed there to think, that such finding would have been sufficient in common cases; but that, being an action in an inferior court, the *assumpsit* was not all which was necessary to be laid within the jurisdiction; but it was necessary also to state, that the work was done within the jurisdiction; and that was the cause why the judgment was reversed.

*Foster, J.*

This is in substance only one issue. The jury could not have found him generally guilty, if he had proved his justification.

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at seasonable times. That, at a court of common council, 5 *Mar.* 1747, it was resolved, that when the lease to *Smith* should expire, the land should be let to some other person. That an entry thereof was made in the corporation book. That, on the 10 *Feb.* 1756, *Wilsford* did (without the order of the corporation) obliterate and deface this entry, to the great damage of the corporation. That, on 7 *Mar.* 1757, at a meeting of the corporation, duly assembled, *A. B.* (one of the capital burgesses), charged the said *Wilsford* with the offence, which the said *Wilsford*, then and there, confessed; and being required to shew cause why he should not be removed from his office for the said offence, offered nothing in his defence, and, therefore, they amoved him.

*Mr. Gould* took three exceptions to this return.

1st. The assembly that amoved him, does not appear to have been duly convened.

2d. There does not appear a sufficient cause of amotion.

3d. If so, yet there ought to have been a previous conviction at common law.

The greatest exactness, and precision, is required in these returns beyond any other proceeding; because, it being an application to be restored to a franchise, the court requires a full and exact state of the facts to be laid before them, with all expedition.

They will intend every thing against the return. *Show.*  
 364. 6 *Mod.* 309. 2 *Salk.* 433.

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issue), saying, that due notice was given, from time to time, of such meetings, was held insufficient.

2. There is no sufficient cause of amotion.

The return contains, first, a narrative of the facts; and there, indeed, it is said to be to the great damage. 2dly. The charge of the fact, and there no such damage is alleged; but the ground of the amotion is, that he confessed the fact, which he might do, and yet, had it been charged to have been to the damage of the corporation, he might have denied that, and shewn it was none; and if so, no cause of amotion; and, as far as the court can judge from the import of it, it could be no damage, for it was several years after *Smith's* lease had expired. *Carth.* 176.

3. There should have been a previous conviction at common law.

Three species of offences are causes of amotion. 1. What are infamous. 2. Such as are merely against the duty of his office as a corporator. 3. Such as are of a mixt nature, and partake of both.

In the 1st, a previous conviction is necessary. In the 2d not; and in the 3d it remains doubtful. And this, if any offence, is of the 3d species.

In the case of *Rex v. Mayor of Derby*, *Trin.* 8 & 9 *Geo.* 2. Lord *Hardwicke* enumerated the three kinds of offences, and mentioned the doubt as to the last, and cited *Rex v. Mayor of Wigan*, *Mich.* 8 *Wm.* 3., reported in *Comb.* 396. 5 *Mod.* 257. 2 *Salk.* 428., where the amotion was for erasing a name in the corporation-book,

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intend nothing against the franchise, but what is returned; but a return sufficiently certain to a common intent is sufficient.

As to the objections that have been taken.

1. That the corporation was *duly assembled*, is sufficient, and no particular notice is required by the charter; and it does not lie in *Wilsford's* mouth, to say they were not, for he was one of them; and, being charged with the offence, confessed it, and never desired further time for his defence, &c. And if, in fact, it was not a regular assembly of the corporation, he may traverse the return, and put that fact in issue.

2. Erasing, or obliterating, entries in a corporation-book, is a sufficient foundation for amotion, without shewing any particular damage. It is contrary to his oath as a corporator; and, if a particular damage must be alleged, there would be no knowing where to draw the line.

3. This is properly a corporation offence, and not to be considered as perjury, forgery, &c. which are punishable by indictment. Here no indictment could be maintained, therefore it is properly cognizable by the corporation.

As an answer to the case of *Rex v. Mayor of Derby*, and the other cases there referred to, he cited 1 *Keb.* 597.

Lord Mansfield, C. J.

I see there are gentlemen retained to take notes for another argument, and I desire to have it argued again. It being the case of a corporation, the law ought to be laid down with as much precision, and certainty, as may



be, to prevent disputes arising from the animosity of parties, &c.

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Stands for another argument.

The case of *Rex v. Mayor, &c. of Liverpool*, being determined before this case came on for a second argument, was thought too strong to be got over; and, therefore, in this case, a rule was obtained for a peremptory mandamus, without further opposition, in *Hilary Term, 1759*.

BASKET agt. UNIVERSITY of CAMBRIDGE.

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THIS was a case sent by the late Lord Chancellor *Hardwicke*, (by order, dated the 24th of *January, 1743*,) for the opinion of this court, upon two questions, arising upon several acts of parliament, letters patent, and grants of the crown, disclosed by the several parties, by bill and answer. Those relied on by the plaintiff are as follow: 26th of *April, 1 Ed. 6*. That king, by letters patent, grants to *Richard Grafton* the office to be his printer of all and singular acts, books, pamphlets, statutes, &c., to hold from the death of *Berkley*, for the term of his life, with a salary of 12*d.* sterling per annum, with a prohibition to all others not to imprint.

The king's printer alone has express authority to print the statutes; but the University of *Cambridge* are also so entitled, under words sufficient to convey the copyright of acts of parliament.

*Bl. R. S. C.*

29th of *December, 1 Mary*. The queen, by her letters patent, (reciting the surrender of *Richard Grafton*),

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grants the office to *John Caywood*, for life, in the same manner.

24th of *March*, 1 *Eliz.* The queen grants the office to *Richard Jell*, and *John Caywood*, in the same words, only uses the words *acts of parliament*, instead of acts. To hold for their lives, and the life of the survivor, if her majesty should so think fit.

27th of *September*, 19 *Eliz.* The like grant to *Christopher Barker*, for life.

8th of *August*, 31 *Eliz.* The like grant to *Robert*, son of *Christopher Barker*, to hold from the death of *Christopher*, with power of printing *abridgments of acts*.

10th of *May*, 1 *James* 1. The like grant to *Christopher*, the son of *Robert Barker*.

11th of *February*, 14 *Jac.* 1. Grant to *Robert*, son of *Robert Barker*, for the term of 30 years.

\*20th of *July*, 3 *Car.* 1. Reciting the last patent, and an assignment thereof to *Norton*, and *Bill*, confirms the grant, &c.

\*26th of *September*, 11 *Car.* 1. Grant to *Charles*, and *Matthew Barker*, to hold from the death of *Robert*, their father, for the life of the survivor.

24th of *December*, 27 *Car.* 2. Grant of this office to *Thomas Newcomb*, and *Henry Hill*, for the life of the survivor.

13th of *October*, 12 *Ann.* Grant to *Benjamin Took*, and

\* These, and the subsequent patents, have the words *sole right*, &c.

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and the then king, unto the *Barkers*, &c. empowering them to print certain books, and that, by an order of Star-chamber, the 23d of *June*, 23 *Eliz.* it had been decreed, that no other person should presume to print those books, contrary to the true meaning of such letters patent under the great seal, upon pain of imprisonment, and other penalties; and that, by proclamation, the 25th of *December*, 21 *Jac.* 1. the said decree was commanded to be observed, &c. That divers controversies had since arisen, whether the stationers, and printers, appointed by the university of *Cambridge*, might print any of the books contained in such patents). The king, graciously intending, that the franchises of the university shall in no wise be abridged, but to amplify the same, from his great zeal for the advancement of learning, and in order to quiet such controversies, and that all ambiguities and doubts might be taken away, doth ratify, and confirm, unto the said university all their privileges; and further, doth give and grant unto them full power to imprint (with the approbation of the chancellor, and three doctors in divinity) all or any of the *books* mentioned in any of the letters patent of *Eliz.*, *Jac.*, or the then king, notwithstanding such letters patent to other persons, &c.

Under these several letters-patent, and statutes, the defendants, the university, insist, that the plaintiff has not the sole right to print acts of parliament, under the letters patent of 12 *Ann.*, but that they have a right, and have used to appoint three printers within the university, who of right ought, and have used, to print books, and also the act of parliament for the uniformity of the common prayer, but that they have not used to print any other acts of parliament, till they printed the book after mentioned. That 1 *Jan.* 1740, the university, under their common seal, appointed *Joseph Bentham* (being an inhabitant, &c.) to be one of

their printers. That 19 *March*, 1741, the chancellor and three doctors in divinity approved of the said *Bentham's* printing a book, entitled, "An exact Abridgment of all the Acts of Parliament relating to the Excise," &c. That *Bentham*, accordingly, printed and sold it at *Cambridge*, and *Charles Bathurst*, his agent in *London*, sold them there.

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*Bentham*, and *Bathurst*, together with the university, were made defendants, and the bill prayed an injunction, and an account of the profits of the sale of the books, &c.; and obtained an injunction till hearing: and, the cause coming on the 24th of *June*, 1743, the late Lord Chancellor ordered this case to be sent to *B. R.*, with the two following questions:

1. Whether the plaintiff has, or has not, the sole right of printing all acts of parliament, and abridgments of acts of parliament, exclusive of all others?
2. Whether the university of *Cambridge* have the privilege of printing acts, and abridgments of acts, of parliament?

Mr. *Comyn*, for the plaintiff.

The question is, whether the plaintiff, upon the true construction of these acts of parliament and letters patent, has the sole right of printing acts of parliament, and abridgments, or whether the university of *Cambridge* have a concurrent power with him; for, as to all others, he has a clear exclusive right?

1. Are the powers contained in these patents grants of one and the same thing?

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## 2. If so, can they stand together ?

The office of king's printer is an ancient office, that has existed ever since printing was introduced into *England*. The patents here stated derive it down for upwards of 200 years, by regular grants from the time of *Ed. 6.*; and this officer alone has, during all that time, printed all acts, and abridgments of acts, till the university went out of their way by printing the book which gave rise to the present question, which, though it might turn to the advantage of the printer, could be none to the members of that learned body.

Before printing was introduced, acts of parliament were proclaimed by sheriffs in their county courts, where transcripts were kept for the people to resort to. 4 Inst. 26.

Printing was introduced here in the time of *H. 6.* From the time of *H. 6.* to *H. 8.* was but forty years; and it appears, that these proclamations were continued for some time during the reign of *H. 7.*, printing being but awkwardly done at first.

From the first printing of the acts (upon which the custom of proclaiming them ceased), we may conclude they were printed by the king's printer; for though we can produce no patent for that purpose till 1 *Ed. 6.* appoints *Richard Grafton*, yet it is certain *H. 8.* had appointed — *Berkley* to that office, because *Ed. 6.* grants it upon his death; and there is a grant 21 *H. 8.* of £4 per annum to *Berkley*, who is styled *impressor noster*; and this was five years before his patent to the university.

The patent of *Ed. 6.* has the word *statutes*, which is the same as acts of parliament; but, to put it out of doubt,

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by letters patent, appointed his printer to print all acts of parliament and abridgments, &c. exclusive of all others; but the king cannot grant the same office to different persons for the same time, or grant the office to one and the profits to another.

*H. 8.*, by his patent to the university, never intended to give them this power, but only to print such books as the chancellor and doctors of that university should *approve* (*because*, before that grant, no book could be printed without a licence). But acts of parliament bind every subject, and therefore could not be the objects of the approbation or disapprobation of the chancellor and doctors.

*Chambers*, in his Dictionary, defines a book to be "a composition by some person intelligent therein, containing some matter of wit or learning," &c. But acts of parliament consist of ordinances, commands, prohibitions, &c. and do not fall within this description.

By 13 and 14 *Car. 2.* none are to print books, or pamphlets, without entering them with the Stationers' Company; but this extends not to acts of parliament, but is understood of books of science, &c. and therefore they are not to meddle with acts of parliament, or books relating to government, which are excepted, &c. Neither are they to meddle with the printing of any book wherein the king's patentee has the sole right. 1 *Vern. 275. Hill et al. v. University of Oxford*, which was in 1684.

The preamble to the statute of *Eliz.* shews what books were intended, *viz.* for maintaining good and godly literature. The act gives the university no new power of printing.

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The last argument arises from usage, which is always allowed to be the best interpreter of such grants. The king's printer has *solely* exercised this right for 200 years. The university never pretended to it till their printing the book which brings this case before the court, and was 120 years after their last patent by *Car. 1.*

In *Seymour's* case, 1 *Mod.* the court said, great regard was to be had to the usage under the letters patent of *Eliz., Jac. 1.,* and *Car. 1.* In the present case, we have an uninterrupted usage under the letters patent of *H. 8., Ed. 6., Mary, Eliz., Jac. 1., Car. 1, Car. 2.,* and *Ann.* For all or some of these reasons, I hope, the court will be of opinion with the plaintiff.

Mr. Solicitor-General (*Yorke*) for the defendants.

There are two questions stated for the opinion of the court, which was occasioned by the different pretensions of right insisted on by the bill and answer. But this does not restrain the court or counsel from considering them in their manner of arguing as one single question, *viz.*

Whether the defendants have a concurrent right with the plaintiff to print acts of parliament, and abridgments of acts of parliament, or whether the plaintiff has the sole right?

This is a case of great consequence to the university, and the public. To the former, as it affects a right granted to them by the grace and bounty of former princes, in opposition to the monopoly set up by the plaintiff. To the public, as they are interested in preventing such monopolies.

The power of the crown is admitted by both parties; they both found their claims upon it.

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It may be proper to open the law a little as to the prerogative of the crown in this matter. I shall therefore consider,

1. The prerogative as it stood at common law; and here more particularly how the crown had, in fact, assumed it at the time of the grant by *H. 8.* to the university.
2. The grants themselves, distinguishing between that of *H. 8.* and that of *Car. 1.*; because, if doubtful on the former, the latter may be considered as an original grant.
3. The usage in consequence of those grants, which, I admit, is a very material ground of argument in such cases.

1. The king had no prerogative over the art of printing, at common-law, distinct from parliament. Had the crown claimed the sole right of granting power to exercise that art, it would fall within the rule against monopolies.

It is a mechanic art; and as to the crown's pretending a right by purchase, by *H. 6.*, and Archbishop *Bourchier's* introducing the first printer here at the king's expense, it would have no weight, if it were true; but the fact is certainly otherwise, as *Dr. Middleton*, in his *Dissertation on the Origin of Printing*, has plainly demonstrated.

In the case of the Stationers' Company, and *Partridge*, *Mic. 11 Ann.*, it was said, you might, by the same rule,



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make a monopoly of the business of an apothecary; and *Moore*, 675, was cited, to shew, that the first apothecary was brought into *England*, at the king's expense, from *Flanders*.

The crown never pretended a prerogative to grant licences antecedent to the mere printing: this would be treating things as *mala in se* before they had existence. The right of the king to animadvert, by his courts of justice, upon books of an evil tendency, commences not till the publication; and this doctrine has always prevailed, but more particularly since the Revolution.

In 1664, during the reign of *Car. 2.*, and during the dispute between the Stationers' Company and Colonel *Atkyns*, the law-patentee, this fiction was invented, that printing was a flower of the crown, acquired by *H. 6.* by purchase, by bringing the art into *England*. *Cart. 89.* *Hale*, C. J. gave judgment for his patent; but on the 26th of *May*, 1675, that judgment was reversed in the *House of Lords*, though the then Lord *Anglesea*, who was a man of great abilities, and well versed in the law, proposed to refer the question to all the judges of *England*, but was outvoted, and thereupon entered his protest without any reasons, according to the practice of those times, as appears by the journals of the *House of Lords*, which I have had searched.

The prerogative right of the crown is not in monopolizing the art of printing; but it claims a *copyright* of all acts of state, as acts of parliament, proclamations, orders of council, &c. as having the executive part of government.

Besides which general ground, the crown has a right to some copies from expense. Thus *Grafton's* great

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of claiming a prerogative over the press. The *imprimatur* was introduced by the act for uniformity in religion, and was borrowed from the Inquisition, where the same method is used to check publications.

There is but one instance of a prohibition from printing any book previous to *H. 8's* grant to the university, *anno* 1533, and that was in 1526, and is mentioned in *Fox's Book of Martyrs*, 490; and that was plainly founded on the statute of 2 *H. 4. c. 17.* for suppressing heresies, and not upon the king's prerogative.

About seven years after that came the grant to the university, and about five years after that (1539) an injunction issued, prohibiting the importation of books from abroad without licence; but this did not relate to books printed here, and was plainly made in consequence of the statute 25 *H. 8. c. 15. anno* 1533.

By 3 & 4 *Ed. 6.* superstitious books and images are abolished; and in 1553, which was 2 & 3 *Ph. & Mary*, a proclamation issued against importing heretical books, as they then termed all the writings of the reformers: but this was founded on 2 *H. 4. c. 17.* for suppressing heresies, and not on the king's prerogative.

In the next year, 1556, was the first charter to the Stationers' Company, requiring all printers to be of that company. This was in the last year of *P. & M.*, and twenty years after the grant to the university.

In 1558 (1 *Eliz.*) that charter is ratified. In 1559 there was a proclamation against heretical books; and in that year was the first regulation requiring printers to take a licence, with provisions and injunctions as to the

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they were printed by the king's printer, which shews, that the crown claimed this copyright very early; and *Berkley*, who styles himself printer to *H. 7. & 8.*, from 1503 to 1528, is called *impressor noster*. These grants, then, could not be intended of an exclusive nature, as appears from civil, and literary history.

This copyright being asserted, divers learned men, of both universities, about 1531, and particularly in 1533, advised an application to the king for a grant; and *Grafton*, who was a zealous friend to the reformation, began a translation of the Bible into *English*, under the protection of *Francis* the First, the *French* king, but was restrained, by proclamation, till a translation was settled; and accordingly in 1540, he is intrusted to print the great folio *English* Bible, but was deprived by Queen *Mary*. *Ry. Fæd.* vol. 14, p. 766.

The like copyright was claimed to *Lilly's* Grammar, recommended to be used in all schools, they being then subject to the ordinary's visitation. *vid. Ward's* Preface to his late edition of *Lilly's* Grammar, printed in 1754.

It is plain, then, that the crown had no prerogative, but a copyright to law-books, and Bibles.

I come down to the second general question, which I shall divide, and consider it,

1. Upon a construction of the patent, 26 *H. 8.* to the university, and the several patents to the king's printers, down to 3 *Car.* 1st.

2. Upon that, and the subsequent patents.

The patent to the university by *H. 8.* is general, *omnes*

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main under his general power as C. J. So of a particular patent to the great seal to have jurisdiction as to redeeming mortgages, because that is a power annexed to the office; but it is contrary of ministerial offices, *ex. gr.* The office of clerk of the crown in chancery, is an ancient office by prescription, yet *Jac.* 1. granted away from it the province of granting licences of alienation, and it continued from that time a separate office till the abolition of the court of wards. The clerk of the patents was also severed in like manner from that office, and so remains to this day. So this being, at most, a ministerial office, the king may name as many printers as he thinks fit.

And to his being an officer in the room of the ancient transcribers of the statutes, it is, in fact, no such thing, but the records of parliament are made up exactly as they were before printing was introduced; and of mere private acts the printed copy is no evidence, but an examined copy from the roll; and the case before Lord *Hardwicke* was of a *public* act not printed in the statute-book; and the reason the printed act was allowed was, because, being a *public act*, the judges are supposed to be acquainted with it, and know from memory whether it be true or not.

As to Mr. *Chambers's* definition of the word *liber*, to shew that acts of parliament are not books. It appears, by *Pliny's* Natural History, that *liber* is the inner bark of a tree, which then answering the end of paper, several of them rolled up together became a volume, and so *liber* and *volumen* are the same; and, if so, the statutes may well be called books, and the right of printing them pass by the words *omnes et omnimodos libros*.

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*Bro. Patent Pl. 65.* Grant to a felon shall not amount to a pardon by implication. 5 Rep. 66, a.

3. If it be doubtful which is intended to pass, it is void, 12 Rep. 86.; therefore, if for no certain estate, nothing, not even an estate at will, shall pass. *Davis, 45. a.*

But there is a wide difference between these cases, and where the general words comprehend two different things, one of which the king might grant, and the other not, for then it shall pass what he had the power to grant.

It was argued, 1st, That the king had the general power over printing. 2dly, That he had an absolute copyright over the statutes; but, I contend, he had only the latter; and, therefore, as the general words would comprehend both, the latter must necessarily pass, that the grant may take effect; for the king shall not be intended to have designed to make a void grant. 8 Co. 56. 167. 2 Inst. 496, 7.

This reasoning is strengthened by the act 13 *Eliz. c. 29.*, which declares that the patent of *H. 8.* shall stand, and be in force according to the true meaning, &c.

As to the question upon the patent of *Car. 1.* in *July*, to the *Barkers*, and the patent in the *Feb.* following to the university.

The patent to the *Barkers* alarmed the university, who applied to the crown, whereupon the king not only confirms their privileges, but further grants (and there are words both of confirmation and original grant) that they may print all, or any of the books mentioned in the patents *H. 8. Eliz. or Jac. 1.* to the king's printer; and this

being the sense of the crown, is binding to the crown; and, therefore, if there was an exclusive grant to the *Barkers*, it was only for their lives, and, by consequence, determined 10 Jan. 1679, and then the grant to the university would take effect as a reversionary grant come into possession, and might be pleaded, as well as an original grant, as a confirmation, the grantees having accepted it as such, and, therefore, it may enure as an original grant.

1738.  
 BASKET  
 agt.  
 University  
 of  
 Cambridge.  
 K. B.

Though the *Barkers* could not be prejudiced by it, yet, when their interest determined, it took full effect. That it was good to pass such reversionary interest, I rely on Lord *Chandos's* case, 6 Co. 56.

Here the king is not deceived, he is fully apprized of the matter, and thinks he has a power to grant a concurrent right to different persons in possession; but if it proves that he has not, then he that has the absolute grant, shall take it as a reversion expectant on the determination of the particular interest, and the king is not deceived, because he intended to pass the whole interest.

No doubt, the king is not restrained to any particular mode or manner of granting, as bishops, &c. are. *Show.* P. C. the case of the master of the King's Bench office.

### 3. As to the head of usage.

Arguments drawn from hence, have the greatest weight in construction of charters, insomuch that the king himself is bound by it. 2 Ro. Abr. Prerog. 195. § E. the case of the Bishop of *Winchester* (the king's almoner), and *Walker*, lessee of the city of *London*.

1758.  
 BASKET  
*agt.*  
 University  
 of  
 Cambridge.  
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How has the usage stood in this case? Have the king's printers excluded all others from printing statutes? History informs us of the contrary; nay, the statutes themselves are now to be purchased, particularly 19 H. 7. printed by *Berkley*, the king's printer, *Wynken de Worde*, and two or three others. So, in 1553, they were printed by *Grafton*, though *Berkley* was then alive, and *Grafton's* patent did not take place till *Berkley's* death. So, in latter times, the law patentees have exercised a concurrent right. In 1636, the statutes were printed by the assignees of *Moor*: so in 1667, by the assignees of *Atkyns*, and the king's printer not named. *Keble's* edition has the assignees of *Sayer*, joined with the king's printer, and so has the late edition.

As to the university printing law books. In 1605, *John Legat* printed Doctor *Cowel's* Institutes, and the right was not disputed; and had the university printed *Rolle's* Abridgment, as the Stationers' Company did, they would have shewn a much better title.

Their right to print bibles is not disputed; and, if the general words are sufficient to pass the king's copyright as to them, why not as to others?

But it is found, they have all along printed the Act of Uniformity at the beginning of the Common Prayer book, and that alone is sufficient to establish the usage; for, if they have a right to print one, they have the same to all. But the argument is much stronger in the case of abridgments, as this is, which require labour, and the learning, and judgment of an author; and, therefore, Mr. *Comyn's* reasoning is not applicable to them.

To conclude. As to the inconvenience the public

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of  
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to say, that the prince intended in the same year to grant the same thing to one, that he had before granted solely to another.

Lord *Mansfield*, C. J.

The case has been exceedingly well argued, and the subject quite exhausted, and; therefore, there needs be no further argument.

The question is placed in as clear a light as possible, and we are obliged to the gentlemen for the pains they have taken.

What power the crown had assumed, in fact, at the time of the grant by *H. 8.* to the university, is very material as to the construction of those patents; whether to operate as to the general right of printing, or only with respect to the king's copyrights, because we must presume the crown intended to grant what they had, or, in fact, assumed a right over.

Mr. *Comyn* admits, that, by the words *omnes, et omnimodos, libros*, the university have the right of printing bibles, and common prayer books; and the whole of the distinction between these and the statutes is, that the latter are not to be considered as books.

In a few days afterwards the judges certified their opinion as follows, *viz.*

Having heard counsel on both sides, and considered of this case, we are of opinion, that during the term granted by the letters patent, dated 13 of *Oct.* in the 12th year of the reign of *Queen Anne*, the plaintiffs are entitled to the



right of printing acts of parliament, and abridgments of acts of parliament, exclusive of all other persons not authorized to print the same by prior grants from the crown.

1758.  
BASKET  
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University  
of  
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K. B.

But we think, that by virtue of the letters patent, bearing date the 20th day of *July*, in the 26th year of the reign of King *Henry VIII.*, and the letters patent bearing date the 6th day of *February*, in the 3rd year of the reign of King *Charles I.*, the chancellor, masters, and scholars, of the University of *Cambridge*, are intrusted with a concurrent authority to print acts of parliament, and abridgments of acts of parliament, within the said university, upon the terms in the said letters patent:

MANSFIELD.  
T. DENISON.  
M. FOSTER.  
E. WILMOT.

24th Nov. 1758.

The KING agt. GOALER of IPSWICH.—K. B.

THIS was an application for an information against the goaler of *Ipswich*, for a supposed misbehaviour in the execution of his office. The affidavits on which the rule was granted, were sworn before the attorney for the prosecution. Mr. *Whitaker* now, on shewing cause, objected to the reading those affidavits on that ground. Mr. *Willes, e cont.*, would have distinguished between Affidavits upon which an information is applied may not be sworn before the attorney in the prosecution. Hil. T. 32 G. 2. 1759.

1759.

The KING

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Goaler of  
Ipswich.

K. B.

affidavits made on the original motion (as in this case), and affidavits made after there was a cause in court.

*Sed per cur.* The reason is the same in both cases, and the affidavits cannot be read. And the C. J. said, it was considered as a misdemeanor in an attorney to take affidavits in a cause which he is employed in.

Rule discharged.

LAMEGO *agt.* GOLD.—K. B.

A bargain to take place in case of a contingency not usurious.  
2 Burr. S. C.

ASSUMPSIT, in consideration of two guineas, to pay the plaintiff twenty guineas, on the death of defendant's wife. On non-assumpsit, there was a verdict for the plaintiff, subject to the opinion of the court, on a case which stated that the defendant's wife was then 70 years of age, and is since dead.

Mr. Gascoigne, *pro quer.*, argued, that the agreement was not usurious, as it was impossible to say when the woman would die.

The court broke in upon the argument, and said, The case does not state this to be an usurious contract, therefore the court cannot intend it to be so; it may be only a foolish bargain. If one person, in consideration of a sum of money, promises to pay another a much larger sum in case there is not a girth round the horse at *Charing-cross*, and this is done colourably, *when both know how the fact is*, it may, to be sure, be usury, otherwise only a foolish bargain.

*Postea* to be delivered to the plaintiff.

1759.

TUDWAY

agt.

BOURNE.

K. B.

that morning a prize of £500, and it was held, in chancery, to belong to the creditors, and not to the bankrupt.

The KING *agt.* Mayor, Bailiffs, and Common Council, of the Corporation of LIVERPOOL.—K. B.

A particular summons of a corporation assembly held requisite in order to amove a member; and bankruptcy no cause for the amotion of a common councilman. 2 Burr. 723. S. C.

THIS matter came before the court, on a return to a *mandamus*, to restore *Joseph Clegg* to the office of common councilman for the borough of *Liverpool*, from which he had been removed.

The return stated the constitution of the borough, and the charters of incorporation, &c.; and that there was a power in a select body, *viz.* the mayor, bailiffs, and common council (which consisted of 41 members), to amove for a just and reasonable cause.

It further stated, that the corporation was seised of a large real estate, *viz.* £2000 *per annum*, and of a considerable personal estate.

That the office of common councilman is an office of great trust, in controuling the revenues of the corporation estate, and in appointing officers for the purpose of receiving the rents, &c.

That *Clegg* was a trader, and became a bankrupt, and a commission issued, to which he paid obedience, and had not, at the time of his amoval, obtained his certificate. That he thereby became incapable of executing his said office. That afterwards, *viz.* 1 Feb. 1758, the mayor,

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The KING

agt.

Corporation  
of

Liverpool.

K. B.

in order that nothing may be done by a cabal for want of numbers attending; and also for this additional reason, that the members may have an opportunity to consider the question to be agitated, and prepare themselves to debate it with more propriety.

If I am right in this, the return is insufficient in this respect; for it only states that on 1 Feb. 1758, the members of the common council in *due manner* met, and the assembly was *duly held*. Now this does not import necessarily the facts requisite to constitute a due meeting, but is only a conclusion, which is not sufficient in return to a *mandamus*, where the greatest strictness is required, as appears by many books. 1 Show. 282. *Reg. v. Evans*. So in the cases of convictions on the game laws. So in the case of *King v. Chapman* for robbing an orchard. So even in indictments, 5 Mod. 94. 6,

2. The proceedings were irregular for removing Mr. *Clegg* without summoning him, and his appearance does not cure that defect. 4 Mod. 37. Where the charge only concerns a person in his natural capacity, his voluntary appearance may be sufficient, but it is otherwise with respect to his corporate capacity; because the whole corporation have a right to the service of, and have an interest in, each member.

It, indeed, required a very legal understanding in Mr. *Clegg*, to know whether he was a bankrupt, which is a matter of law; and every one is not a bankrupt against whom a commission issues.

The intermediate steps necessary to make him a bankrupt are not set out; it is only generally alleged, that he was a trader, and became a bankrupt, which the common council are no judges of.

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The KING  
agt.  
Corporation  
of

Liverpool

K. B.

determined nothing on that point of the case, but held the return bad for another cause, *viz.* it stated that the party kept himself locked up in his house with loaded pistols; but did not state any summons of him to appear, or that he could not be summoned.

Mr. Clayton, *e contra*'.

As to the 1st objection. The return states, that the members in due manner met, and then and there duly held a common council. The court must therefore intend the meeting was a legal one, either on the charter, or prescriptive day, and if so, no summons was necessary, for all the members are bound in duty to attend at that time; in case the meeting was not duly convened, that fact might have been traversed, as was done in the case *Green v. Mayor of Durham*, lately in this court. I do admit, if they met without summons on a day which was not their charter, or prescriptive day, it was bad. *Kynaston v. Mayor of Salop, Pasch. 8 G. 2. Str.*

This is the usual form of returns, and to alter it would be to introduce great difficulties, as it might be said that all the members of a great corporation must be mentioned *nominatim*: but here no inconvenience can ensue, as the facts may be traversed.

As to the 2d objection. He was present at the time: he required no further time to answer. It is true a person cannot be convicted, if absent, without a summons, but, if he appears, it is otherwise. 2 *Salk.* 428. is in point, where this difference is taken. In convictions on the game laws, if it is stated that the party appeared, and was heard, it has been held sufficient though no summons is stated.

1759. *mandam*  
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 K. B.

This *Clegg*, and every other common councilman, should have had a notice; I do not mean by this, the notice under the 2d objection, for that I do not meddle with.

*Bagg's* case is the *magna charta* in matters of this sort.

In *Salk*. it is held, I think, that bankruptcy is not a sufficient cause to repeal letters of administration.

A bankrupt may be a very upright man, and his not having gained his certificate signifies nothing; he may be entitled to it, and yet, not have it, by means of the absence, or unreasonableness of his creditors; and they seem to admit, that if he obtained his certificate, he could not be removed.

There is another objection.

The charge, or information, is not sufficiently stated in the return. *Baynes's* case.

*Foster, J.*

The return should have set forth, that the meeting was on a charter, or prescriptive day, or else a summons, though I think *they need not set forth the special reasons of their meeting*, because, then, nothing but that business could be transacted. This, I think, is as far as it can be carried.

2. As to the 2d objection I shall only say a word. I think it is natural justice that a man should have a proper opportunity to make his defence; and in order for that, he should have time to reflect, and consult his friends:



BAYLEY *agt.* DILLON.—K. B.

A bankrupt sued on a promise to pay an old debt, not proved under the commission, discharged on common bail.

2 *Burr. S. C.*  
and see  
*Peake's*  
N. P. C. 99.

THIS was a rule *nisi* to discharge the defendant on common bail. The case was thus: On 7 *May*, 1754, a commission of bankruptcy issued against the defendant.

On 30 *August*, his certificate was signed by the commissioners, and, in the beginning of *September*, it was allowed by the great seal. The plaintiff did not prove his debt under the commission.

About the end of *Sept.* 1758, the defendant acknowledged the balance of the account to be due to the plaintiff, and promised to pay it when he should be able. Upon this the action was brought, and the defendant arrested.

*Mr. Williams* now shewed cause against the rule.

It was objected, by *Mr. Norton*, that the statute 5 *Geo. 2.*, discharges the bankrupt from all debts previous to the bankruptcy; but I submit, that this debt, for which the defendant is now arrested, is a new debt. The consideration for this promise is good, and meritorious, being a debt undischarged, which the party was bound in conscience to pay, and a conscientious obligation is sufficient foundation for a legal promise.

Upon the statute of limitations, though the six years are elapsed, yet if the defendant afterwards promises to pay, it revives the debt. 6 *Mod.* 309. *Prec. in Chanc.* 385.

1759.  
CHAUVET  
agt.  
ALFRED.  
K. B.

An action being brought on this bond, and the judgment for the plaintiffs, the defendant brought a writ of error, but did not put in bail according to the statute 3 Jac. 1. c. 8., apprehending this was not a bond for money *only*.

The plaintiffs proceeded to execution notwithstanding the writ of error, and a rule having been obtained to shew cause why the execution should not be set aside, and the goods taken thereon restored, now, on shewing cause, the sole question was, whether this was such a bond as entitled the plaintiffs below to require bail on the writ of error. The counsel for the defendant insisted it was not, and compared it to the case of a bond for performance of covenants, &c.

*Sed per cur.*—This is a bond for payment of *money only*, and, therefore, is within the letter of the statute, and we will not narrow the construction of so useful a law as this is; especially as writs of error are generally used for delay.

The question is the same here as on every common bond on *non est factum*, and whether the money is paid by *Sutton*, or *Alfred*, makes no difference.

Rule discharged.

THE KING agt. GWYN, Esq. and *others*.—K. B.

An indictment on which the defendants had been convicted by submission at a quarter sessions in Wales, being removed hither, a *procedendo* granted.  
2 Burr. S. C.

THE defendants were indicted, at the last *Epiphany* sessions for the county of *Brecon*, for a common assault. They pleaded guilty, but no fine was imposed at that sessions.

The prosecutor removed the indictment by *certiorari*, but not the plea, and conviction.

Mr. Price now moved for a *procedendo*, as this was the case of a common assault only, in which the defendants had pleaded guilty, and as there could be no difficulty in the case.

Mr. Hervey, *e cont'*.

It is only after convictions on the merits that this court will not remove indictments of this kind, and the proceedings thereon; as in that case the court who have tried the cause are best judges, upon the evidence given, of the nature of the offence; but where the defendants plead guilty, as in this case, this court can have the same means of judging as the court below. And in this particular case our affidavits say, that the prosecutor cannot expect justice at the quarter sessions, as the defendant, *Gwyn*, has a father, brother, and two uncles, on the bench.

*Reply.*

This matter is now in the same state as an indictment after conviction on a trial, and in that case no *certiorari*

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 BEAR  
 agt.  
 SOPER.  
 K. B.

right, possessed himself of the effects of *Bearford*. That upon the death of *Soper* and *ux.*, *Bear*, who married one of the daughters of *Bearford*, had obtained administration *de bonis non* of his goods unadministered by *Soper* and *ux.* *Bear* admitted he had paid debts of *James Soper*.

*Soper* libelled against *Bear*, in the court of the Archdeacon of *Totness*, for intermeddling with the goods of *James Soper*.

And a rule *nisi* for a prohibition being obtained, Mr. *Hussey* now shewed cause.

He admitted, that if *Bear* had only intermeddled, by detaining some of the effects of *Soper*, an action of trover would have been the proper method; but as the plaintiff in prohibition intermeddled generally, and as the spiritual court had a right to grant administration to whom they thought proper, he insisted they had a jurisdiction to punish *Bear* for interfering; he cited *Dyer*, 166. *Ro. Abr.* 818.

*Per cur.* It is a mere action of trover.

Rule for a prohibition made absolute.

————— agt. SPELMAN. ——— K. B.

A roll of a judgment entered up thirty years before, allowed to be brought in, and docketed, conditionally.

Mr. *Norton* obtained a rule to shew cause why the plaintiff should not now be at liberty to bring in a roll of a judgment, signed (in pursuance of a warrant of attorney)

HURST *agt.* The EARL of WINCHELSEA.—  
K. B.

An appointment by will precluded by a descent to the appointee, as heir of the appointor. 2 Burr. and 1 Bl. 187. S. C.; and see *Fearne on Remainders*, 76.

THIS was a case sent out of Chancery by Lord Hardwicke, for the opinion of *B. R.* and the case stated,

That *Thomas Herbert*, being seised in fee of the premises in question (being £1400 per annum), and having issue by *Elizabeth*, his wife, one son, *Thomas Herbert*, did by will, dated the 17th of *October*, 1734, give and devise, in the following words, *viz.*

“ I give, and bequeath, to my dear wife *Elizabeth*, after  
“ payment of my just debts, all my money, plate, house-  
“ hold goods and furniture, wheresoever; and all my  
“ goods, chattels, and personal estate, real or personal  
“ whatsoever and wheresoever, that shall be in my pos-  
“ session, or I shall be in any wise entitled to at the time  
“ of my decease. And I further give, devise, and be-  
“ queath to my said wife, and her heirs, such part of all  
“ my real estate that I have any power to dispose of by  
“ this my will: And I further give, devise, and bequeath  
“ to my said wife, out of the other remaining part of my  
“ said real estate, for her better support and maintenance,  
“ till my son *Thomas* attains the age of 21 years, the sum  
“ of £400 per annum; and my will is, that the several  
“ bequests and devises to my said wife as aforesaid, shall  
“ not, nor are intended to prejudice my said wife in her  
“ thirds, or dower, out of my said real estate.” And  
appointed his wife sole executrix.

*March* 15th, 1736, he died seised, without revoking, or altering his will.

29th *April*, 1739, *Elizabeth*, his widow, intermarried with *John Powell*; but previous to such marriage, she, by lease and release, 24th and 25th of *April*, 1739, in consideration of 5s. conveyed the premises to the use of herself in fee, till the marriage, then to herself for life, and then to the Earl of *Winchelsea*, and Lord *Harcourt*, for a term of years since determined; remainder to *Thomas Herbert*, her son, for life; remainder to trustees to support remainders; remainder to his first and other sons in tail; remainder to the heirs of his body; "and for default of such issue, to the use and behoof of such person and persons, and for such estate, intents, and purposes, as *Elizabeth Herbert* (the grantor), should, whether covert or sole, and notwithstanding her coverture, by deed executed before two witnesses, or by her last will, or other writing purporting to be her last will, and executed before three witnesses, limit or appoint; and, in default of such appointment, to the said *Elizabeth Herbert*, her heirs and assigns for ever."

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 HURST  
 agt.  
 The Earl of  
 WINCHELSEA.  
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8th *July*, 1739, *Elizabeth Herbert* (then wife of *John Powell*) died, leaving *Thomas Herbert*, her only son and heir, having first by her will, duly executed and attested by three witnesses, dated the 8th of *May*, 1739, (after giving £200 to her husband, £10 to her mother, and some other small legacies) bequeathed as follows: "I give to my dearly beloved son *Thomas Herbert*, and his heirs and assigns for ever, all my real and personal estate, but first subject to the payment of all my debts, funeral expenses, legacies, and servants' wages, and all other debts; and I do hereby charge the same there-with." And appoints her said son, and Lord *Harcourt*, executors.

25th *February*, 1739, *Thomas Herbert*, the son, died an infant, and intestate, and without issue, leaving *Roger*

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HURST

agt.

The Earl of  
WINCHELSEA.

K. B.

estate as he would have taken by descent, he shall be considered as taking by descent, and not by purchase, the former being his better title, because it tolls entries, &c. &c.; and this rule holds, whether it be devised subject to, or without a charge legal or equitable, and whether of a present estate, or a remainder; and whether absolute or conditional, it being sufficient that the quality of the estate is the same as that which he would take by descent; but where the devise alters the quality of the estate, it is otherwise, *ex. gr.* devise to two daughters (who are testator's co-heiresses) and their heirs, they take as purchasers by the will, because that makes them joint-tenants, and so alters the quality of the estate that would have descended to them as coparceners—all this is settled in *Clark v. Smith*, Salk. 241. and *Lutw.* 793. S. C. and in *Hynd v. Lyon*, 3 Leon. 64. 70. *Dyer*, 124. S. C. and in *Cro. Eliz.* 833.

Therefore the charge will make no alteration.

### 3. Upon the deeds, and will, taken together.

In feoffments, or other conveyances to the use of a will, there has been a distinction taken between a power to a stranger, and to the owner; and, in the last case, whether it be to the use of the will generally, or to the use of such persons, and for such estates, &c. as he shall appoint.

In the case of a power to a stranger, the estate must pass by the power. But where it is a power in the owner, and he executes it by will in favour of his heir at law, the heir is in by descent of his ancient use, and nothing passes as an execution of the power; but where he executes it in favour of a stranger, nothing can pass but under the power.

This doctrine is illustrated in Sir *Ed. Clere's* case,

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the words of this deed in the surrender; it would then be exactly the case of *Clark v. Smith*, in 1 *Lutw.*

When this matter was argued in *Chan.*, it was objected that this case differed from those of copyholds; for that the use in this case must arise out of the estate in the trustees, and so the appointee be in of a new use as appointee, and not as heir.

To this I answer—The old use resulted to *Eliz.* and she had a right to dispose of it as a remnant of her ancient use, and might have given it by will to a stranger; but not having done so, it is descended to her heir. Had the will given it to a stranger, or had the limitation been to a stranger in default of appointment; in either of those cases the will would have operated, and the use have been considered as resting in the trustees, to be called out to support the springing uses when they arise. But, as the case here is, the heir does not want the assistance of the appointment.

Another objection was made—That the will is to be considered as part of the deed, as if copied into it.

Answer.—1st, The case of copyholds is the same.—2d, It is a testamentary act, and not to take effect till her death, and then, whether it be considered as a deed, or a will, makes no difference; in either case it descends, &c. 2 *P. Wms.* 258. (623.) *Broad's* case, cited by *Holt*, C. J. in *Bath v. Montague*.

Another objection.—It shall be so construed, that the will may operate if possible.



Answer.—The case of copyholds is the same. But further, here it has its use, as it brings a charge upon the estate, and for that purpose it was necessary, but no further.

Suppose the son had died in the lifetime of his mother, the devise would have lapsed, and the next heir would have taken by descent. So did the son here, and it would have been assets in his hands, before the statute of fraudulent devises.

To make him take as a purchaser, you must suppose him named in the deed; but no rule of law warrants such a fiction, which is forced and unnatural.

In the case of the Duke of *Marlborough* v. Lord *Carlisle*, before Lord *Hardwicke*, in November, 1750, on the will of Lord *Sunderland*, vesting £30,000 in trustees, with power of appointment in Lady *Sunderland*; she being a *feme covert*, executed her power of appointment as to part by will, or a testamentary instrument in the nature of a will in favour of Lady *Morpeth*. Lady *Morpeth* died before her, and Lord *Carlisle* claimed as representative of Lady *Morpeth*, contending that there was no lapse by her death; for that the will being only an appointment, had relation to Lord *Sunderland*'s will that created the charge, and Lady *Sunderland* was only the instrument, &c. and therefore Lady *Morpeth* surviving Lord *Sunderland*, though she died before Lady *S.*, was entitled. But Lord *Hardwicke* held, "Though it was an execution of a power, yet being a testamentary act (though not strictly a will) it has all the qualities incident to a will; and every person taking under a power, must take according to the nature of the instrument appointing; and therefore the appointee dying before the testatrix, or appointor

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"by will, it is lapsed and void." That was a naked authority, or is coupled with an interest, and therefore stronger.



So in *Oke v. Heath*, 4th November, 1748, before Lord *Hardwicke*, a like appointment was held lapsed, and the instrument considered as testamentary.

If this were considered as incorporated in the deed that reserves the power, yet it must be taken according to the nature and operation of the instrument, which is testamentary, and with all the properties and qualities incident thereto; namely, the words are to have the same effect as in a will, as if to *A. for ever*; a fee would pass. So, nothing would pass thereby till the appointor's death, which is a necessary incident to every testamentary act. And therefore the limitation in the deed to answer this must be, To *T. H.*, and his heirs, *if he be living at my death*, and so would pass only a contingent remainder to the son expectant on her death. But the limitation of a contingent remainder *inter vivos*, is very different from that given by will: the former is transmissible and irrevocable, the latter ambulatory and revocable.

But, supposing she might so have worded the matter, did she intend to do it? because this being a will, her intention is to prevail.

There are no words that shew it, nor from which it can be inferred; but the direct contrary. She never refers to her power, but devises in consequence of her right of ownership; and though she had no power to make a will but in consequence of the deed, yet her intention was to pass her estate, whatever it was, by the will; and the court can only clothe that intention with proper words;

but there is no foundation to say, she intended he should take as a stranger by purchase, as if named in the limitations in the deed: this would be a forced construction. The law favours, and respects, the ancient use, and it is more rational to construe this to have been her intention; and then the heir took by descent, and his maternal heir is entitled.

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Mr. Solicitor-General, for the paternal heir.

The 2nd general question is the material one in this case.

1. As to the 1st question, I admit, that I cannot rely much on the arguments to be offered. It is manifest the testator did not intend wholly to disinherit his son.

By the first clause in the will only chattels real would pass; and as to the other clause, the words *such part*, &c. and the giving her £400 a year out of the *other part* till his son attained 21, prove to a demonstration he never intended her the whole; so saving her right of dower. As to the rent-charge of £400, this construction might be put upon it—"I give £400 per annum to my wife till my son attains 21, and then I give the same to my son."

But although the whole is absurd, and proceeded upon a mistake, (thinking part of his estate to be in settlement, though he had barred it by a common recovery, and limited the fee to himself), yet I will not labour this point, as I think it is against me.

2. The deed, and will, must be taken as one instrument, as if the will was to all intents and purposes incorporated into the deed, and then the estate would pass by limita-

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tion, and the will, enuring, by way of execution of the power, pass the estate to the heir by purchase.

2nd point.

1. Whether devising the estate to the heir with a charge, does not break the descent?

2. If not, whether the acts done in execution of the power do not pass the estate to the heir, as a purchaser, which is the most beneficial way for him; because then both lines of heirs will be let in to inherit.

1. As to the first of these points, I own I think it is not maintainable, though there are authorities in the old books to that purpose; but they were all considered and answered in *Clark v. Smith*, and by Lord C. J. *Treby's* argument in that case, grounded on sound reason.

(C. J. That point is clear, and was agreed in this court in 1747, *Allen v. Heber*.)

2. This is a question of nicety, and entirely new. It must be determined on the metaphysics of the law, viz. whether it is to operate by way of conveyance or by way of use.

There is seldom a question between the two lines of heirs, where the inclination to favour one side holds so strong as here; because the estate came from the father's side, and came contrary to his intention; for he plainly thought, that he had not a power to dispose of the whole of what he possessed.

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right heirs in the same deed, the heir always takes by descent. *Co. Lit.* 22. b.

1. As a present use.—Suppose the limitation were to husband and wife, and after the death of husband and wife, to the son and his heirs; this would be a present use to the son.

2. As a future use.—After the death of the covenantor, or a stranger, (in a covenant to stand seised), To the son and his heirs; this is a future use, and shall take effect out of the estate of the covenantor. So, if it were by feoffment, &c. the seisin of the feoffee, &c. would spring to serve the use when it should arise, and the event should happen.

3. As a contingent use.

To the son, and his heirs, in case he shall be living at the grantor's death. This is a springing future use, to arise upon a contingency, and the *scintilla* that remains in the grantees shall start at once to serve it when it arises. *Fitzg.* 452. In this case, if the son should live till the time, he would take this contingent use by purchase.

Upon this last point, I insist the will is to be incorporated into the deed, and so passes a contingent use to the son, as if the limitation had been in the deed in these words—"To *T. H.*, and his heirs, if he be living at the death of *Eliz.*"

This I shall argue on principles of law, and not on particular authorities of cases, the stating of which breaks the chain of an argument.

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But where the estate passes by transmutation of possession, the case is very different, as in feoffments, fines, lease, and release, &c. : there, at common law, the seisin was in the grantee; and though the statute has executed the use, yet there is a *scintilla* remaining in the grantee to support the springing use when it arises. Here, I contend, is such a contingent use (To *Thos. H.*, if he be living at the death of *Eliz.*), and this remains unexecuted by the statute till the contingency happened by the death of *Elizabeth*, when it arose by way of springing use, to be supported by that *scintilla* that remained in the releasees.

There is this further difference between a covenant to stand seised, and a conveyance by transmutation of possession. The first is no revocation of a former will: so if it be with particular limitations to *A.* and *B.* for their lives, with the remainder in fee in the covenantor; this would be only a revocation *pro tanto* of such former will\*, the same as a subsequent will of part would be: but the second is an absolute revocation, though the whole use results to the grantor, as was solemnly settled in the case of *Lord Lincoln v. Roll*, in *Show*, P. C. and the reason is, because in the one case the seisin remains all the while in the covenantor; in the other, the old use returns, yet it is out of another seisin and estate.

If then there is such a seisin in the grantee as is sufficient to revoke a former will of the grantor, *a fortiori*, has the grantee a seisin sufficient to support a new use limited by the grantor, and make it vest in his own right heir, if expressly named, as a purchaser.

Objection.—They admit this would be so, if the limitation was to the heir (*nominatim*) in the deed; but that the case here is different, being a devise to the heir by will.

\* *Cro. Eliz.* 721. *Cro. Car.* 23. 4.

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from it, must be considered as incorporated in the deed; and then the limitation will stand, To *T. H.*, and his heirs, *if living at his mother's death*, because that is a quality or condition implied by the nature of the instrument; therefore this was a contingent remainder to *Thos. H.*, the son.

The case of the Duke of *Marlborough*, which has been mentioned, was this: Lord *Sunderland*, by his will, bequeathed the interest of £30,000 to Lady *Sunderland*, with a power to appoint the principal. Lady *Sunderland* afterwards married, and during that coverture did, by will, appoint part of that sum to Lady *Morpeth*. Lady *Morpeth* died before Lady *S.* Lord *Carlisle* was Lady *Morpeth's* representative, and after Lady *S.'s* death claimed the money appointed to Lady *Morpeth*, because she being alive at the death of Lord *S.* who created the power, though she died before Lady *S.*, there could be no lapse; because her appointment was to be considered as incorporated in the will of Lord *S.* But Lord *Hardwicke* decreed the contrary, because the grantor having given her power to appoint by deed or will, and she having chosen to do it by will, it must partake of the qualities incident to that kind of instrument, one of which is, that the devisee be living at the death of the testator.

This case, then, is an authority, that what is implied shall be deemed to be incorporated; and this is agreeable to a much older authority, *Kibbet v. Lee*, *Hob.* 312.

The limitation then must be taken to stand thus, viz. "To *T. H.* and his heirs, if he be living at the death of "*Elizabeth*." If he survives her, and so the contingency happens, he takes the fee by purchase. If he dies before her it lapses, and the appointment is void, and then the

resulting use passes to her next heir by descent. But wherever the limitation is to the heir *nominatim* by way of contingent remainder, there he takes as a purchaser.

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Objection.—To repel this, they say, here is no such limitation either expressed, or implied.

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Answer.—They agree, if he died before her it would lapse. This proves that the interest he was to take was contingent, the same as if expressed in the limitation.

The appointment ought to be so construed as to enure most strongly against the appointor, and in favour of the appointee. It is most for the appointee's interest to take as a purchaser, that both lines of heirs may inherit.

Mr. *Sewell's* reply.

I admit, if the limitation was to *T. H. in the deed*, either present, future, or contingent, he would have taken by purchase: but this is not so; on the contrary, the limitation (in default of appointment) is to her, and her heirs, so that nothing remains in the grantee, but the grantor is in of her old use and original ownership; and whether it be by covenant to stand seised, or by conveyance and transmutation of possession, it makes no difference as to this, whether it remains or results.

Had this been an appointment in favour of a stranger, it must have operated; but being to the heir, he has no need of it, and as to him it is a nugatory act (as to passing the estate), though in this case it has its use in charging the estate with debts, &c.

This case is not distinguishable from the copyhold cases, which have not been answered.



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This case has been extremely well argued on both sides, and the subject quite exhausted, and therefore no further argument will be necessary. We will take a little time to look into the cases, and will then certify our opinions. But, for the sake of the students, I will just break the case, though I give no opinion.

The candour of the gentlemen who argued this case has caused them to make many concessions. 1st, That *Eliz.* took the whole in fee. 2dly, That the charging it by her will with debts, &c. does not break the descent. 3dly, That it is an established rule of law, that where the party, whether it is by gift, limitation, or grant, is to take the same estate he had before, it has no operation, but is a mere nullity: *ex. gr.* one seised in fee grants to himself, or reserves to himself by use expressed or implied, it does not operate at all, it does not change the quality of the old use.

Upon the same principles, a devise to the heir has no operation; it gives him what he had before: it has no operation, but leaves it as before; the estate comes to him *simul et semel*, by devise and by descent, or rather it descends first; and this not singly in favour of the heir; but (as Mr. Solicitor has said) for the sake of third persons, *viz.* the lord in respect of his tenure, and the creditor for his lien, which (before the statute 3 and 4 *W. and M.* against fraudulent devises) would have been defeated had the heir taken by purchase.

The whole point in this case is, whether in legal construction *T. H.* is to be supposed to have taken an estate by purchase, vested in him in the lifetime of his mother, by relation to the deed of release, or nothing till her death; be-

determination like that in Sir *Edward Clere's* case, which was plainly in order to avoid the restraint upon land held by knight's service, of aliening only two-thirds by will; if there is, it ought to be looked into and considered, for it is a question of great consequence.

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After the argument was gone through, the C. J. said they would certify their opinions. And, from what his lordship then dropped, the court seemed to continue in opinion, as on the first argument, that the son took by descent, and consequently the plaintiff, the maternal heir, entitled; and he relied much on what was said by *Baldwin*, C. J. in the Abbot of *Bury's* case, in *Dyer*.

### Copy of certificate.

Having heard counsel on both sides, and considered of this case, we are of opinion, that the estate in question in this cause, passed by the will of *Thomas Herbert*, the father, to the said *Eliz.* in fee.

We are also of opinion, that *Thomas Herbert*, the son, did not take the estate from his mother by purchase, but by descent; consequently, upon his death, it descended to his heir *ex parte maternâ*.

27th November, 1759.

MANSFIELD.  
T. DENISON.  
M. FOSTER.  
I. E. WILMOT.

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18th of December, 1759, The Lord Keeper decreed in favour of the maternal heir, agreeably to the above certificate, from which decree the paternal heir appealed to

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the House of Lords, and cases were printed, and delivered, and several days fixed for its coming on; but, being adjourned from time to time in hopes of a compromise, the parties at length came to an agreement, and the appeal was dropped.

Easter T.  
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The KING agt. HERBERT, *et al.*—K. B.

Information  
against  
overseers, for  
procuring a  
marriage, to  
change a set-  
tlement. See  
2 Const. 68.

MR. NORTON now shewed cause against a rule nisi for an information against the defendants (who were overseers of the poor of *Trinity* parish, in *Coventry*) for a conspiracy, in procuring one *Yardly*, a cripple, who was a parishioner of *Great Harborough*, in *Leicestershire*, to marry a young wench who before belonged to *Trinity* parish, and thereby easing themselves, and burdening *Great Harborough*.

The officers, in their answer to the charge, pretended, the match was of the party's own making, and that they only attended to see the ceremony regularly performed.

But the court thought they had not sufficiently exculpated themselves, and held this (if true) to be an offence proper for the animadversion of the court, and therefore made the

Rule absolute.

(*The King v. Tarrant*, B. R. Trin. 7 Geo. 3. an information was granted in a like case.)

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four days in the next term, yet, in criminal cases, the party may move in arrest of judgment any time before judgment is actually entered; but here he insisted, that a four days rule having been given in the crown-office, at the expiration of which rule, judgment was entered against the defendant *quod capiatur*, that this was such an entry of the judgment (though the sentence of the court was not given) as would prevent any motion in arrest of judgment; and relied on the case of the *Queen v. Darby, Salk. 78*, as in point.

But the court said, the defendant may move in arrest of judgment any time before sentence, and the awarding a *quod capiatur* is only in the nature of an interlocutory judgment, in order to bring the defendant in to receive the sentence of the court, which is the final judgment.

Therefore the case stands to be spoken to on the merits.

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The KING *agt.* MAYOR and Jurats of RYE.—  
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A mandamus issues to admit a jurat, good cause shewn.

ON a motion for a *mandamus* to swear in a new jurat, the court laid it down as known practice, that, when a corporation officer is elected, a *mandamus* may be applied for, of course, to swear him in. But if the application is made on affidavits, and those affidavits shew clearly, that the party was not well elected, the court will not then grant the *mandamus*, nor make any rule for that purpose upon another application made without affidavits. But if

the validity of the election be doubtful, the writ must go, and the matter be controverted on the return, or otherwise, and the writ accordingly went in this case.

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Mayor of  
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The KING agt. CHAMBERLAINS of WORCES-  
TER.—K. B.

AN *habeas corpus cum causâ* had issued to bring up a record of an action commenced in the court of *Common Pleas* for the city of *Worcester*. The action was, a plaint entered in the said city court for £3, a penalty under a by-law, for exposing flesh to sale (by a foreign butcher) in any other place than the common shambles erected for that purpose. By the by-law the penalty was to the chamberlains to be applied towards the support of the almshouses of the city, and to be recovered in the city court, *and not elsewhere*.

On the return of a by-law to a *habeas corpus cum causâ*, a *procedendo* cannot be awarded to any corporation, *London* excepted.

2 Burr. S. C.

A motion having been made for a *procedendo*, that was now opposed by Mr. *Norton*, Mr. *Price*, and others. They urged that the by-law was bad, in confining the proceedings for the penalty to the city court, and excluding, by negative words, the courts at *Westminster*.

On the other side, cases of *procedendos*, in the case of the city of *London*, were cited, and 1 *Lev.* 14. 6 *Mod.* 123. 177. as in point; in which, as was contended, were the like negative words as here. (But this the other side denied, though the books are so, for that the by-laws, on which those cases were founded, had been looked into, and had no such negative words.)

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The court gave no opinion, but seemed to think, 1st, that such negative words would vitiate a by-law even in *London*.

2. The court started a doubt, whether they ought to enter into the validity of this by-law in a summary manner, and grant a *procedendo* in the case of any cities or borough except *London*.

The matter was ordered to stand over to have precedents searched, and to be spoken to on that point.

Accordingly on another day it came on again, and all sides agreed that no case was to be found where a *procedendo* had been granted on the return of a *habeas corpus*, except in the case of *London*. But

Serjeant *Nutres*, who argued for the *procedendo*, relied on 1 *Ro. Abr.* 232. as analogous; and argued, that as no case could be found where it had been granted, so there was none where it had been refused, and therefore contended it was left open for argument upon the reason of the thing. That to compel corporations to proceed to declare here, would, in effect, amount to a repeal of the greatest part of their by-laws, where the penalty is so small that it will not bear the expense of suing in the superior courts, and consequently every one who removes their proceedings by *habeas corpus* will go scot free.

Mr. *Morton*, on the same side, urged, that in many cases justice could not be done but in their own courts, by reason of many local customs, which the common law knows nothing of. As actions on a *concessit solvere* in some cities; so on a *verbal covenant*, at *Bristol*. So a

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plies a negative, such as calling a woman a strumpet in *London*; covenant on a parol promise at *Bristol*, &c.

Mr. Norton, *et al. contra.*

The precedents with regard to customs, and customary actions, do not apply to the present case, which is that of a by-law creating a penalty, within time of memory, concerning the recovery of which this court have certainly as ample powers as any inferior court.

Lord Mansfield, C. J.

Whether on the return of a by-law upon an *habeas corpus* the court can look into it without first putting the corporation to declare upon it in this court, is the single question?

Now, by the course of the court, there is a known established method of proceeding here in such cases, as much as there is for declaring upon a *latitat*: and it is agreed, there is not a single instance, (except in *London*) where the court have looked into the by-law upon the bare return. Here *Littleton's* rule applies strongly, that what has never been done ought not to be done. What was the reason of distinguishing *London* from other corporations is not now material, it is sufficient that such a distinction is now clearly established.

I am, therefore, clear in my opinion, that you must proceed to declare, and then this court may judge of the goodness of the by-law.

Denison, J.

It stood over only to see if precedents could be found; and there being none, I am sure I shall not give my

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to do in that case, nor can we grant an *habeas corpus* to remove prisoners of war. His being a native of a nation not at war does not alter the case, for by that rule many *French* prisoners might be set at liberty, as they have regiments of many other kingdoms in their service, as *Germans, Italians, &c.*

But, if the case be as this man represents it, he will be discharged upon application to a Secretary of State.

Vide *Barth Herndrick's case, Hil. 2 Geo. 3.*

2 Wils. 31.  
S. C.WHITAM *agt.* HILL, *et al.*—C. B.

The plaintiff in an action on the riot act is entitled to costs, and so in all cases where damages are given by statute, made before or since the statute of Gloucester.

THIS was an action brought against the defendants, inhabitants of the hundred of upon the stat. 1 Geo. 1. session 2. c. 5. § 6. the plaintiff's house, &c. having been pulled down. On the trial the plaintiff had a verdict and damages, but the prothonotary (*Jones*) had a doubt whether he could tax costs *de incremento*. The court was therefore moved for their direction to the officer in this matter; and it having been once argued before, was now spoken to a second time, by Serjeant *Hewitt*, and Serjeant *Poolc*.

Serjeant *Hewitt*, *p. quer'*.

The legislature have made the statute of *Eliz.* and the statute of hue and cry, their plan in the law whereon this action is brought; the construction therefore of those statutes is material.



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construction put upon both. The words used in that statute are the very same as in this; *damages* only are mentioned, not a syllable said of costs. The statutes of 28 *Ed.* 1., 28 *Ed.* 3., 7 *R.* 2. and 27 *Eliz.* which are in furtherance of the statute of *Winton*, mention nothing of costs; but yet the uniform practice in actions of hue and cry has been to give the plaintiff costs; and that must have been because costs were always legally considered as part of the damages. And some of the cases say, unless costs were given the statutes would be nugatory. That costs have been given on the statute of hue and cry, appears by the entries in several cases. 2 *Saund.* 378. *Boyle v. Hundred of Exminster*, in *Devonshire*, *Trin.* 2 *Geo.* 2. *Rot.* 1051. in C. B. *Penryn v. Hundred of Ossulston*, in *Middlesex*, *Michaelmas Term*, 1743, B. R.

The legislature also has recognised this practice to be lawful, as appears by 8 *Geo.* 2. c. 16. The words there are *costs* and damages recovered, &c.

By 2 *Inst.* 570. it appears, that before the statute of *Winton*, no action lay against the hundred; therefore this case is not to be distinguished from those on that statute.

Costs have also been given on this very statute in B. R. in the case of *Wilson v. Ross*, 21 *Geo.* 2. in an action for pulling down a meeting-house at *Sheffield*, as appears by the record, though it passed *sub silentio*.

Serjeant *Poole, e cont'*.

This is no new point, but established as much as any in the books, and so considered in *Westminster Hall*.

The distinction between double and single damages is

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In *quare impedit*, there were damages in some cases in that action before the statute of *Glocester*; as where the church was not full. Therefore that shews, that it is not the being before or after the statute of *Glocester* merely that causes the difference.

In the case of actions for chasing out of the hundred (which was mentioned on the last argument), there is a penalty besides the damages, therefore that is not like this case, but the penalty may be considered as coming in lieu of costs. 3 *Lev.* 351.

Lord C. J. *Willes.*

Delaying justice and denying justice are considered as the same thing in *magna charta*. And, therefore, as I have no doubt in this case, I shall now give my opinion.

And I think the plaintiff is entitled to costs, for four reasons.

1. By the words of the statute of *Glocester*.
2. By the construction of the word, damages, in this statute of 1 *Geo.* 1.
3. From the reason, and intent, of the act.
4. From the resemblance this statute bears to the statute of hue and cry.

1. As to the first, I should have had no doubt, if doubts had not been made by many cases; for the words of the statute of *Glocester* are clear and express, wherever he is to recover damages, whether by precedent or subsequent statute.

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As to *Pilfold's* case, it is pretty extraordinary, after what Lord *Coke* has said in 2 Inst. 208. I do not allow that authority, and yet do not overrule it, because this case is distinguishable from the general *dictum* there; for here, damages were recoverable for demolishing houses, &c. before this statute 1 *Geo.* 1. though not against these defendants.

*Clive, J.*

This is a new case on this particular statute.

The *expensæ litis*, antecedent to the statute of *Glocester*, was never included in damages in the manner of costs *de incremento*.

The cases deny the generality of the rule of giving costs in all cases where there are damages; *viz.* waste, *quare impedit*.

*Pilfold's* case must, I think, at this day, be allowed to be law.

There being a penalty given in the statute against chasing a distress out of the hundred, cannot alter the case; so that that is also an authority against such general rule.

There is no distinction, I apprehend, between double, treble, or single damages. In *quare impedit* the damages are single.

But then this is not a statute creative of damages, but new persons only are substituted against whom they may be recovered, as my Lord C. J. has very properly observed.

The statute of hue and cry was in the view of the

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It seems reasonable, that wherever a party has a remedy for damages, he should have costs. But it is said, this is not on new created damages. I shall not controvert that here, though I own I do not see the reason. But, without determining that general point, this act manifestly pursues the statute of hue and cry; no difference can be made between them. It is said, the cases arising on that statute have passed *sub silentio*. But the currency of those cases, never contradicted, cannot be overthrown by such an argument.

Here the party had certainly a remedy at common law. This law does not create damages anew, but is only an additional remedy for the action to be brought against other objects, and a kind of auxiliary law.

The statute of 8 Geo. 2. recognises, that costs are rightly given under the statute of *Winchester*.

*Willes, C. J.*

As my brother *Clive* seems, in part, to differ from me, I will say a word or two to explain my meaning. As to *Pilfold's* case, I agree, if the case was where there were no damages *sustained* before, and merely created by statute, there can be no costs. But where there were damages sustained, though not recoverable till the statute gives a remedy, it is otherwise. But I fancy there is no statute which does give damages where none are sustained: it would be unjust

Prothonotary to tax costs, as under the statute of hue and cry.

*Greetham v. Hundred of Theale*, B. R. Trin. 5 Geo. 3.  
3 Burr. 1723. Cowp. 367.

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imposing on the court, and telling a solemn lie upon record. If the defendant was under any hardships, and really had not a reasonable time, by the course of the court, to make his defence, he should have laid his case before the court, or a judge, by affidavit, and obtained a special imparlance.

*Mr. Norton, e cont.*

Defendants were in all cases, by law, entitled to an imparlance to the next term, and this was not altered, until a rule was made about twenty-five years ago in this court, by which the defendant must appear, and plead, in eight days, if the writ be returnable at the second return, which in many cases is impossible, where the defendant lives in a remote part of the kingdom.

The rule of the court is, that where the paper book is not delivered within four, to eight, days after the end of the term, and where it does not contain a fact to be tried at the assizes, there the plaintiff cannot call for a return of the book till the four first days of the next term, and, in the mean time the defendant may strike out his special plea, and plead the general issue. And though the court may make an order for the defendant to stand by his plea, yet the judge, at his chambers, could not.

Therefore the plaintiff was irregular in demanding a return of the paper-book before he was entitled; and, if so, the defendant has a right to apply to set these proceedings aside, and to alter his plea.

*Per cur'.*

Though the plaintiff has been regular, and proceeded

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and presses, in the town-hall, where they had, immemorially, been deposited; that the mayor ought only to keep the keys, but now had removed all to his own house.

The court hesitated, because there was no precedent of such a *mandamus*, and as it would not answer the end of the corporation, because the mayor might comply with the writ, and afterwards remove them again at his pleasure, therefore they granted a rule for him to shew cause why he removed them, &c.

Mr. Norton, and Mr. Harvey, afterwards shewed cause for the mayor, who swore, that it appeared, by several entries in the corporation books, that such of them as were not in daily use, had been kept by the mayor in other places than the town-hall. That he removed them for fear the town clerk, and jurats, should secrete them from him, as they had already done one of them, in order to prevent his filling up the vacancy among the jurats; in doing which he claimed the sole right, though the jurats pretend they must join.

They also insisted, that the court could not interpose in this way, no more than against a steward of a manor, &c. for removing court rolls, &c. That there was no precedent of such a rule as the present. That if the mayor should destroy the books, or make improper entries, &c. they had their remedy by information.

Lord Mansfield, C. J.

This question must be taken upon both the affidavits; and, I am clear, there is no foundation for the court to interpose by rule in this case. I will not go into the general question, whether it would be proper in any case: perhaps no precise precedent in point would be necessary to induce us to it.

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Mayor of  
Rye.  
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Court-rolls are only evidences of private property, and, therefore, differ widely from public records, which concern the administration of justice.

To be sure the officer must have power to remove them upon proper occasions; but as I think, in all cases, prevention is better than punishment, I would recommend it to the mayor, to replace the books, &c. as soon as his present apprehensions are over.

Rule discharged.

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STRONG (Lessee of WILLIAM CUMMIN) agt.  
ROBERT CUMMIN, *et al.*—K. B.

A devise to a third brother in case either of his elder died, implies by reference, *under age*; that contingency not having happened, held, that plaintiff had no claim.  
2 Burr. S. C.

*Robert Cummin*, the father, being seised in fee, according to the custom of the manor of *Eastwoodhay*, in the county of *Southampton*, of nine different estates by nine several copies, on the 24th of *April*, 1731, surrendered them to the use of his will; and, on the same day, made and executed his will, which was written by an exciseman, and most absurdly spelled throughout. It first recited his having surrendered, &c. and that thereby he had power to dispose, &c. He then gives all those his estates, held by seven copies, more or less, to his eldest son, *Robert*, and his heirs. Item, I give to my son *John*, all that belong to *Smart* and *Picket* lands (which are the remaining two copies), and to his heirs, after his mother's death. And, also, that my son *Robert* shall pay to my eldest daughter *Mary* the sum of £100, when she attains the age of twenty-one years, with like to *Esther*, *Ann*

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Lord Mansfield, C. J.

It is plain, from the phraseology, and spelling, of this will, that it was of the testator's own drawing.

The rule of construing wills is this; that no technical form of words is necessary to convey the testator's meaning; and nothing can shew the wisdom of that rule stronger than the present case; but then, the meaning of the testator must be collected from all the parts of the will taken together.

The court cannot make a will for him, nor can they vary their construction on account of events which happen afterwards, but must consider it as if the question arose immediately on the testator's death; so that in this case, *John's* dying afterwards without issue, after attaining twenty-one, can make no difference. And in all cases where courts have altered, rejected, or transposed words, it hath been on this principle, that the apparent intent of the testator, expressed in his will, required it; and, therefore, Lord Hardwicke, in *Coryton* (or *Coddington*) and *Hellier*, where the limitation was, to the father for ninety-nine years, and then to his first and other sons in tail, construed the first limitation, as though it had been to the father for ninety-nine years, *if he should so long live*, because of the strong, violent, presumption, that such was the testator's meaning. So where the devise is to the heir after the testator's wife's decease, this gives her an estate for life, by necessary implication.

In the present case, I had no doubt of what was the testator's intention, upon first reading the will, which is so clear, that no argument can make it plainer.

It is not pretended, that *Robert*, and *John*, were bare tenants for life; and, if they were not, *William* cannot take



by way of remainder. It is plain he was to take upon some contingency or other, which the testator has not expressed; for that they would both die, at some age or other, was certain. Whether he meant to annex more than one contingency to the devise over to *William*, is not necessary to inquire, as he certainly intended one, viz. their dying before twenty-one, which not having happened, there is an end of *William's* title. That he meant this, is beyond a possibility of a doubt. It appears all his children were then under age, and that he had a view to that is plain; for it is so expressed in respect to the younger children's portions, and clearly intended with regard to *Robert*, and *John*; for it is impossible he could mean, that if *Robert* (who took an absolute estate in the seven copies) lived to twenty-one, and sold those estates, and then died, that *William* should, in that case, have *John's* two copies, and *John* have nothing. But the testator considered, that if *Robert* died before he was twenty-one, and, consequently, before he had power to dispose of it, then *John*, as his next brother, must succeed to it; and in that case *William* was to have *John's* two copies. So if *John* died before twenty-one, then *Robert* would have claimed as his heir, which the testator intended to prevent, by directing *William* to succeed him upon that event. The context shews, he had this period of their attaining twenty-one in view, for he has expressly so directed as to the daughters; and then goes on, If your sons, *Robert* or *John*, die (plainly referring to the same period) then, &c.

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Serjt. *Davy* raised a doubt upon an event which might have happened, viz. the dying of *Robert* or *John* under twenty-one, but leaving issue. It is sufficient to say, that was not the case here; if it was, it would deserve consideration. Courts have construed the words dying under

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twenty-one, *or* without issue, to mean *and* without issue. Here it is sufficient, that no part of the contingency happened.

Therefore the *postea* must be delivered to the defendant.

CORNWALLIS *agt.* SAVERY.—K. B.

A replication of the condition of a bond broken by non-payment of a sum of money, is an assignment of a single breach; and a conclusion by an averment proper.

2 Burr. S. C.

DEBT on a bond in the penalty of £1500.

The defendant craves *oyer* of the condition, which recites, that Lord *Cornwallis* had appointed one *William Wilkinson* to be agent to the regiment commanded by *Edward Cornwallis*, esq.; and the condition was, if *Wilkinson* should duly pay and apply all monies to be received by him, or his agents, &c. on account of the said regiment, unto the colonel, and other officers, &c. as the agents of other regiments do, or ought to do; and also account yearly, on 29th *Sept.*, with Lord *Cornwallis*, or Colonel *Cornwallis*, touching his said agency, then the bond to be void. And having set forth the condition, to the effect before-mentioned, he pleaded that *W. W.*, from 20th *Feb.*, 1752, to 4th *Nov.*, 1754, continued agent of the said regiment, and then pleads performance, in the words of the condition, as to paying the money, and accounting annually.

Replication assigns for breach, that between 1st *July*, 1754, and 1st *Nov.* in the same year, *W. W.* received several sums of money of the paymaster-general, amounting to £1400, on account of the said regiment; and that great part thereof, *viz.* £1010 4s. was subsistence money

for the colonel, and other officers; and that the agents of other regiments pay, or ought to pay, the same accordingly; and avers, that *W. W.* has not paid, &c. but made default, &c.: and concludes his replication with an averment.

Defendant demurs, and shews for cause, that the replication is multifarious, argumentative, contains a negative pregnant, is perplexed, complicated, double, and informal.

Mr. *Caldecot*, in support of the demurrer, relied on the distinction between debt for a penalty in a bond and covenant; in the first, any single breach amounts to a forfeiture, and, therefore, you can assign only a single matter by way of breach; but, in covenant, you may assign as many as you please, as tending to enhance the damages; and the rule was strict as to bonds with penalties, that before the statute 8 & 9 *W. 3.*, where it was merely for performance of covenants, yet being with a penalty, only one breach could be assigned; but that act permits the assignment of several breaches in those cases. *Cro. Car.* 176.

Here it is a bond with a penalty, and not for performance of covenants, and, therefore, only one breach ought to be assigned; but here are several breaches, viz. several sums received at several times, and for the use of several persons, and not paying them to the colonel, and other officers, without saying what are their proportions, or what was due to any one of them. To warrant this objection, he relied on a note he had (taken by Lord C. J. *Reeve*), *Easter, 13 Ann.*, of the case of *Royal African Company v. Mason*. Defendant was an agent of the company, and gave bond to account for, and pay, all monies he should receive from them. Defendant pleaded

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performance, as here, in the words of the condition. Replication assigned for breach, that he had received from one *Reynolds*, and of *divers other persons*, several sums, amounting to £630, which he had not paid, &c. And upon a special demurrer, after three several arguments, and great consideration, the court held the replication bad upon the above distinction, as containing an assignment of many breaches.

They should have replied the receipt of some particular sum from the paymaster.

He took another exception; that the replication concluded with an averment, when it should have been to the country; for the plea concluding with an averment, and there being an express affirmative and a negative, to prevent infinity of pleading, an issue should have been taken, &c.

The court stopped Serjt. *Hewitt*, who was to have argued on the other side.

Lord *Mansfield*, C. J.

Mr. *Caldecot's* principles are right, and the case he cited may be right. The rule is, (and a very sensible one too) that where the condition is in the alternative to do one of two or more things, there you must assign, and rely on one particular breach.

Here there is but one entire breach assigned, by not paying a sum of money, which is not the less entire by being made up of several integral parts; and the non-payment of the whole, and not of every unit, is the breach. We all know the colonel is answerable for the agent of his regiment, and this is a bond to indemnify him. If he

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selves of it, for the replication being of a particular fact, it was proper to conclude with an averment.

*Foster, and Wilmot, Js., concurring.*

Judgment for the plaintiff.

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ANONYMOUS.—K. B.

Not allowed to serve a rule nisi for an information on a clerk in court, employed formerly by the defendants.

A RULE having been obtained to shew cause why an information should not be granted against *A. B.* and *C.*, and they having been served with it, Mr. *Hussey* shewed cause, that the affidavits on which the rule was obtained were entitled in the cause *Rex v. A. B.* and *C.*: whereas they should have no title.

Mr. *Norton, e contr'*, admitted this, and said, they had now amended their affidavits by striking out the title, and reswearing them; and as the parties lived at so great a distance that there could not be time to serve them with a new rule, time enough to shew cause this term, he moved, that service on their clerk in court, might be deemed good service.

To which the C. J. inclined, and said, it was common to make such a rule where the party absconded, &c.

But Mr. *Hussey* strongly opposed this as a new and dangerous practice; for there is, in fact, no cause in court, nor any clerk in court for the defendants; and because they, in a former cause, employed a particular clerk in court, that they must, therefore, never employ any other,

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ground, and withal founded in perjury, the rule ought to be discharged with costs, saying that costs were discretionary in this as well as other cases: and Judge *Foster* remembered two precedents of rules for *quo warranto* informations, which were discharged with costs, from the boroughs of *Heydon*, and *Wareham*. And *Wilmot*, J. said, he should have been inclined, in this case, to have made a precedent, if there had been none.

Rule discharged, with costs.

The KING agt. The ALDERMEN of NEW RAD-  
NOR.—K. B.

A *quo war-  
ranto* in-  
formation  
issued for  
holding an  
annual office,  
after its  
close, tries a  
civil right.

THERE was another rule against two other aldermen of the same corporation, for exercising the office of alderman, for the year 1754.

The defendants produced a rule *nisi*, which was obtained against them, in 1755, for the same offence, which, it appeared, was afterwards discharged; but whether upon the merits, or by consent, or who was the then prosecutor, did not appear, but it was obtained on the same affidavit of parson *Lewis*, as the present.

But the court thought this was not a sufficient answer, as it did not appear, that the merits had been considered by the court at that time, nor that the prosecutor was the same:

But Judge *Foster* then started another question, whether an information could be applied for, by a private relator, for usurping an annual office (for so is that of an alderman

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The commissioners had (*inter alia*) impaneled a jury, and made a decree, or order, awarding damages to Mr. *Trafford*, and Mr. *Hesketh*, for injuries which they had sustained; and that decree having been inrolled at the sessions, was brought up hither by *certiorari*; and now several objections were made to it, to prevent its being filed.

1. There does not appear to have been any previous complaint; nor any dispute between the undertakers, and the owners, and occupiers; therefore the commissioners had no jurisdiction.
2. It does not appear, that the parties had ten days' notice.
3. The complaint should have been in writing.
4. The names of the particular owners and occupiers should have been set forth, and a particular description as to what lands they complained the injury was done to. The tenants should have been named, that proper challenges might be made to the jury.
5. The commissioners have assessed damages by reason of the towing-paths; whereas they have no power to give damages for them.

Mr. *Gould*, and Mr. *Aspinall*, in support of the orders.

1, 2, and 3. The act contains no particular directions as to this matter; and here the parties have appeared by themselves, and counsel, and produced their witnesses, and the whole affair was gone into. This, too, is the

## NOTES OF CASES IN K. B. &c.

case of an *order*, and, therefore, all the preliminary steps need not be set forth; but the court will intend every thing introductory to the jurisdiction.

The

4. This is also preliminary. The parties acquiesced, and made no objection. As to the want of an opportunity of challenging, they should have objected at the time, that they were apprehensive they could not have an impartial jury.

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5. Towing-paths are expressly mentioned in the first clause of the act, by which the commissioners have a general power to award damages; works for containing, maintaining, and preserving the navigation, include towing-paths. But though towing-paths are some of the articles of the complaint, yet they are not mentioned in the decreeing part; but damages are given by reason of the navigation, and of a lock newly erected.

Mr. Norton, and Mr. Yates, *e contr'*.

1 and 3. A previous complaint is necessary from the nature of the thing: so a particular description of the grievance, as to person, place, &c. that the undertakers may come prepared to answer it.

2. Ten days' notice is expressly required, which is necessary to found their jurisdiction, and is not to be intended; and there is a case in *Str.*, on the small tythe act of King *W.* where a general allegation of notice was held insufficient.

4. Without particularizing the lands, and the names of the owners and occupiers, the parties are deprived of their challenges of the jury; and the decree is so un-



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certain, that it cannot be pleaded, or made use of on a second complaint for the same matter.

5. This proceeding being upon the 21st section of the act, for damages sustained in consequence of the navigation, and not on section 1. for a recompense for leave to make their cuts, &c. through the land of other persons; the commissioners had no jurisdiction as to the towing-paths for which they have given damages.

Though the order states that all parties appeared by their counsel, &c., yet it is not stated, that the merits were debated on both sides; and, in fact, they were not, but the undertakers excepted to the method of proceeding.

This court will keep a strict hand over all summary inferior jurisdictions, and will intend nothing that is necessary to give them jurisdiction; that where a special authority is given, it must be strictly pursued, appears by *Rex v. Manning*, Trin. 30, and 31 Geo. 1., (1 *Burr.* 377.) and other cases.

*Denison, J.*

The court will do what they can to support these kind of orders, but can intend nothing that is necessary to give jurisdiction, but that must be set out. Now here their jurisdiction does not take place, unless the parties cannot agree among themselves, and have refused to abide by the mediation of the commissioners; all this, therefore, is essential to their jurisdiction, and must be alleged; and however it may have the appearance of defect in form only, is, in truth, matter of substance.

There are a great many other objections to this order, in point of substance.

1. A particular notice to the parties should be alleged.

2. The complaint, and notice, should particularly specify for what lands, and to whom belonging; because this decree is to be binding, and should be so certain as to be pleaded to any subsequent complaint.

Lord *Mansfield*, C. J.

To be sure the court will, as strongly as they can, lean against objections in point of form in these cases; but all inferior judges must set out enough in their proceedings to found their jurisdiction.

Here the commissioners have plainly proceeded under a mistake by confounding two different clauses of the act; the first of which ordains a satisfaction (once for all) for damages in taking away the ground of private persons, and which must be paid before the undertakers can meddle with it. In that case, therefore, they are, 1st, to give notice what particular lands they propose to cut, with the dimensions, &c. 2d. They are to endeavour to settle the value with the owners. 3d. If that cannot be, the commissioners are to mediate between them. 4th, If either of the parties will not abide by such mediation, or are incapable of doing so by reason of infancy, &c., then the commissioners are to summon a jury to inquire, and assess damages, &c.

The 2d clause ordains a satisfaction for consequential damages, by overflowing the adjoining lands, or obstructing mills, &c.; and this being only a temporary satisfaction, and not a purchase of the inheritance, as the other is, the act does not require the same steps to be taken, but it goes to a jury directly, and it is plain they meant to proceed upon this clause, but that is now de-

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asserted at the bar, because they have given damages for the towing-paths, which they have no power to do by this clause, but that is to be purchased according to the first clause.

However willing we may be to support orders of this kind, the present cannot be established.

*Foster*, and *Wilmot, Js.*, agreed, that the order was bad in substance. 1st. Upon the first clause they must give notice, &c. and shew that the previous steps have been taken. 2d. Upon the second clause, they have no power to give damages for the towing-paths.

Whereupon the return was ordered to be filed, and the decree reversed.

The KING agt. The CORPORATION of WIGAN.  
 — K. B.

The court having granted one set of *mandamuses*, will not grant another to a different party for the same purpose on a manifestation of belief, that the first will be improperly executed, or, without laches in the first applier, order a second to convey the writ. 2 *Burr. S. C.*

THE mayor of this borough for the current year having been ousted by a judgment founded on a verdict on a *quo warranto* information, Mr. *Morton* (of counsel with Mr. *Norton*, and Mr. *Luttrell*, who were the prosecutors, and intended to be candidates at the next election for members in parliament for that borough) produced the *postea*, and thereupon moved for one or more writs of *mandamus* for electing another mayor, pursuant to 11 *Geo. 1. c. 4*, and named *Thursday, 7th June*, for the day of election; and the rule was granted accordingly as of course.

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asking for: and as Mr. *Morton* had obtained one set of *mandamuses*, Mr. *Aston* could not have others without shewing some laches in the persons applying for the first, or some good ground of suspicion that they would not proceed properly, and without having first a rule to shew cause.

: Accordingly Mr. *Morton* had an absolute rule for his writs; and Mr. *Aston* had a rule to shew cause why a *mandamus*, or *mandamuses*, should not issue to *W. C.* as late head of the corporation, when the ousted mayor was elected.

Afterwards cause was shewn against Mr. *Aston's* rule by Mr. *Morton*, Mr. *Aspinall*, Mr. *Gascoigne*, and Mr. *Winn*, who urged,

That the court would never grant such a rule but in cases of evident necessity, upon the fullest evidence, that the other side will not execute their writs, or will not do it properly. This has been the language of the court in all the precedents.

*Michaelmas* term, 1753, in the case of *Scarborough*, the court refused, upon Mr. *Perrot's* motion, to grant cross *mandamuses*, though he cited the case of the borough of *Evesham* as in point; for they said it would be creating a double expense, only to satisfy the apprehension of the parties making the second application, without any just foundation.

In the same term, *Rex v. Sir More Molyneux*, and the steward of the leet at *Haslemere*, cross *mandamuses* were refused; and at last, upon proper evidence that the party first applying had not drawn up the rule, nor proceeded

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*Campbell*, in particular, relied on the third clause of the statute, as expressly requiring it in cases like the present, where there must be a court-leet assembled previous to the election, and which clause is worded differently from the rest. And, therefore, as the other side had not moved for a *mandamus* to hold a court-leet, nor directed their writs to any particular person, the present application varied from theirs.

As to precedents. They mentioned *Hil. 9 Geo. 2. Rex v. Mayor of Thetford*, where the writ was directed to *Matthew Manning*, Esq. by name; so the case of *Sudbury*, in 1758, and *Weymouth*, in 1759, where, in rules to shew cause, the name of the party to whom the writ was intended to be directed was inserted.

But no regard was paid to any of these, for they passed without opposition, or debate; and no precedents were produced where double writs have been granted to several persons, to do the same thing, at the same time, in the same place.

Lord Mansfield, C. J.

It is of great consequence that questions relating to corporations in particular, should be settled with as much precision, and established upon as many clear and certain principles as may be; and that the course of proceedings relating thereto should be known and certain.

It was first moved, as of course, to have double or cross *mandamuses*, but when the master reported the practice to be otherwise, the motion was then varied, and application made upon special grounds.

When a vacancy happens in a corporation, he that

first applies for a *mandamus* to fill it up, has the carriage of the writ, as the consequence of his diligence, and is fairly presumed (till the contrary is shewn) the most ready to see it executed. This is still more so, where the vacancy happens by ousting an illegal officer by *quo warranto*, because the prosecutor of that information has the means in his own hands to enable him to make the first application, as it must be founded on the *postea*, and judgment of ouster (of which he has the custody), which must be produced to shew the vacancy; and this Mr. *Yates* was aware of when he applied in the beginning of this term, that the *postea* might be brought in, but there was no precedent for granting such a motion. The present application must be taken to be made, as of course, for the only two precedents mentioned are those of *Orford*, and *Evesham*, which were long before the case of *Scarborough*, in which they were considered, and yet the court, on full debate, refused to grant cross *mandamuses*. So in the case of *Haslemere*, the court would not grant two sets of writs; but upon the laches of the person first applying, directed the second applier to have the carriage of that same writ.

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As to the court's doing it upon an apprehension that the first will be executed improperly, and that the court will see it directed to the proper officer; how can they determine who that is, without trying and determining the merits in a summary way, by affidavit previous to their issuing the writ? which is what they will never do, and, therefore, never direct the *mandamus* to particular persons, but leave that to the party applying, who is to direct it at his peril.

To grant a double set of *mandamuses* would be of the worst consequence. What confusion, and civil war, must it produce in corporations!

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agt.

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*Denison, J.*

There ought to be but one *mandamus* (under this act) for the same purpose. It would be improper for this court to interpose, in a summary way, as to the direction of the writ, as the whole of the question may depend upon it. It was refused long ago in the case of *Rex v. Nash*.

*Foster, J.*

I am clearly of opinion, that this rule for cross *mandamuses* ought to be discharged. Had it appeared to us that the first would not be executed at all, we might give the carriage of it to the others; but when the question is only, whether they will do it properly, the court will not determine that in this way, nor direct the writ, but leave that to the party at his peril; and if they direct it to an improper person, it is a mere nullity, for the writ confers no right.

*Wilmot, J.*

I am clearly of opinion that there ought not to be two writs, for the reasons given by the court in the case of *Scarborough*.

We will not presume it will be directed to a wrong person; nor will we direct it, but leave that to the party at his peril.

Rule for the cross *mandamuses* discharged.

R. *agt.* A. B.—K. B.

ONE *Brewster*, a tradesman, living at *Salisbury*, being now in town on other business, came into *B. R.* to exhibit articles of the peace against another person in *Salisbury*.

The court refers a party exhibiting articles of the peace, to a magistrate in his own neighbourhood.

The court refused to receive the articles, saying, he might apply to the next justice: and *Denison*, J. said, he had known a *mandamus* go to compel a justice of peace to receive such articles.

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GULLIVER (Lessee of CLARKE) *agt.* SWIFT.

—K. B.

ON a motion to set aside a judgment in ejectment for irregularity in the service of the declaration, it was referred to the master, and he reported the matter specially.

A labourer not paying rent, an occupier on whom service of an ejectment is good.

The ejectment was brought for a house, outbuildings, and land, of £54 *per annum*, and let to one *Johnson*. *Johnson* let one *Dollin* (a labourer, who worked for him) into the house, who lived there, with his wife, without paying any rent. The declaration was served on *Dollin's* wife, who gave it to her husband, and he immediately delivered it to his master, *Johnson*, who said he should not defend it.



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GULLIVER

agt.

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That *Dollin* was assessed to, and paid the window tax for the house: *Johnson* occupied the land himself.

Cur'.

The court were inclined to think, that the service was not good as to the land; but were clearly of opinion it was sufficient for the house; and that there is no need that the person in actual possession should be a tenant paying rent.

*Denison*, J., said, he remembered a case where a gentleman had left his servant in possession of his house, without paying any rent, and without any contract; and the court held, that he should be considered as a tenant at will, and that service of an ejectment on him should be sufficient.

As the judgment was regular, *quoad* the house, the rule was discharged; and the plaintiff to take out execution at his peril.

The KING agt. NICHOLLS.—K. B.

Indictment  
good for a  
forcibly, &c.  
breaking a  
close.

*Mr. Burland* moved to quash an indictment against the defendant, "for forcibly; and unlawfully, entering a willow garden; and digging down a water dam."

He insisted it was a mere private trespass, and an action was the proper mode to redress it.

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The KING

agt.

ROBINSON.

K. B.

it is said in 2 *Hawk.* P. C. 210. § 4. that the proceeding by indictment must be manifestly excluded.

Unless a month was elapsed, the 20s. penalty was not incurred. Here he contemptuously disobeyed the order within the month. Such a contempt is proper for an indictment, because otherwise the party would go unpunished; and it is a rule, that if the punishment mentioned in a statute is not adequate, there an indictment may be used. *Rex v. Turner*, 5 Mod. 329, and 2 *Salk.* S. C. which was an indictment on this very clause; and though it was quashed, it was not on this objection.

That the punishment mentioned in this statute is so, will appear in more instances than one.

1st. If the children had died within the month, the statute-penalty would not have accrued.

2dly. If the party should remove out of the county, the punishment prescribed by the statute could not be inflicted. And that, in fact, was the case here; and that was the reason why the indictment was removed hither by *certiorari*; therefore *Hawkins's* rule applies.

In the case of *Rex v. Davies*, *Hil.* 28 *Geo.* 2. the defendant was indicted for disobeying an order of removal. It was objected that an indictment was not the proper method of proceeding, but the remedy chalked out by 3 & 4 *W. & M.* should have been pursued; but the court held the indictment was proper, because otherwise there had been no remedy in some cases, under that act.

It was always an offence for an inferior to disobey the order of his superior.

*Rex v. Boyce, Trin. 28 G. 2.* an indictment for not paying the costs on the determination of an appeal.

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The KING  
agt.  
ROBINSON.  
K. B.

Here the distress extends only to cases where the party resides within the justice's jurisdiction; and, therefore, if the remedy by indictment is not allowed, the case will be without a remedy.

Further here is no particular mode of recovering the penalty.

2 *H. H. P. C.* 171.

Mr. *Gilbert*, on the same side.

This is not an indictment on 43 *Eliz.*, but for an offence at common law, viz. disobedience to an order of sessions. The remedy which the act of parliament gives, does not take away the common law remedy.

C. J. What Mr. *Gilbert* says seems material.

Mr. *Morton*, *e contra*.

This is a penal statute. 7 *Co.* 36. The act which gives the penalty ought to be pursued. Though a party may be bound by the law of nature to maintain his grandchildren, yet he is obliged by the statute of *Eliz.* only to pay this or that sum.

This order, then, is only an execution of that act of parliament, and like a rate. And I cannot distinguish this case from what is said by Lord *Hale*, in the next paragraph to that which Mr. *Aston* cited.

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 vs.  
 ROBINSON.  
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It does not appear, that there was no remedy here but by indictment, for the indictment does not state that the defendant resided out of the county. And as to what Mr. *Aston* mentioned of the children dying within the month, there was no disobedience till the month expired, that is the time the legislature has fixed.

In the case of *Rex v. Boyce*, it appeared the defendant was not an object of the law, as he was within the jurisdiction.

*Foster, J.*

In the case of *Rex v. Davies*, there had been no way of punishing a disobedience of that sort, from the making of the 13 & 14 *Car. 2.*, till 3 & 4 *W. & M.*, unless the proceeding by indictment was proper; which distinguishes that case from this.

*Denison, J.*

I take this to be an indictment at common law; and though the party was not compellable to do this matter at the common law, yet a disobedience to an order of sessions is an offence at common law, though it be in relation to a matter of jurisdiction newly attached to the sessions; and, I think, it is exactly the case of *Rex v. Davies*.

Let the subject-matter of the order of sessions be what it will, the disobedience to it is a common law offence.

There being some difference of opinion among the judges, the matter stood over to be considered of; and afterwards, in *Trin.* term, judgment was given, to the following effect, by

Lord *Mansfield*, C. J.

The objection in arrest of judgment was, that this offence was not indictable, because, by the 43 *Elix.*, a precise penalty is annexed to the offence, and a particular method chalked out to levy it.

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agt.  
ROBINSON,  
K. B.

The rule is certain, that where a statute makes a new offence, or prohibits people from doing what was lawful before under the sanction of a penalty, that method of punishment which the statute prescribes is alone to be taken; and to this purpose is *Castle's case*, in *Cro. Jac.* But where the matter was an offence at the common law, and a summary way of proceeding given by statute, either may be pursued, and the statute method is only cumulative.

Thus in 1 *Salk.* 45. it was held, that keeping an ale-house without a licence was not indictable, because it was no offence at common law.

The rule which I have mentioned is also further illustrated by the case of *Rex v. Davies*, *Mich.* 28 *Geo.* 2. which was cited on the argument.

In the present case, the thing to be done is in pursuance of an order of sessions, the necessary consequence of disobedience to which is an indictment: and the legislature is to be supposed to have understood that that would be the necessary consequence as much as if they had expressly named it.

Therefore there are two remedies; but though the proceeding by indictment is open, yet it would be very hard, and wrong, to take that method, if the other way may be taken.

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 agt.  
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But here it is said the party could not be proceeded against by distress, because he was gone out of the county.

There may also be another case where the summary remedy cannot be had, and that is this: The legislature do not give the penalty till the end of a month, and, therefore, for any disobedience within that time, the summary method prescribed by the statute fails. But though that is so, yet it would, perhaps, be too hard to take advantage of a disobedience, and proceed by indictment, till that time was expired.

I will just mention two cases which seem to warrant our opinion on this matter, and to be decisive of the question.

*Rex v. Bell, Pasch. 20 Geo. 2. B. R.* an indictment of overseers for not paying over the balance of their accounts, was held good.

*Rex v. Boyce, Trin. 28 Geo. 2.* was an indictment for not paying the costs of an appeal, pursuant to 17 G. 2. c. 38.,\* and was also held good.

Rule for arresting the judgment discharged.

\* V. 8 and 9 W. 3. c. 30. § 3.

Trinity Term, 32d and 33d Geo. II.

The KING *agt.* COWLE, and others.—K. B.

A *certiorari* formerly issued to the mayor of *Berwick-upon-Tweed*, to return an indictment, found at the sessions for that town, against the defendants for an assault.

Whereupon a motion was made to supersede that writ of *certiorari*; and the other side moved for an attachment against the mayor for not returning the record.

In *Hilary* term last, the matter came on to be argued.

Sir *Richard Lloyd*, against the *certiorari*.

The question is, whether this court has a jurisdiction to send this writ to the sessions at *Berwick*?

The writ of *certiorari* is an old writ at the common law, to remove proceedings of inferior courts, by virtue of this court's general superintendency. The intent of the writ is, that this court may judge whether the court below is doing *secundum leges*, &c. *regni Angliæ*. This very form of the writ supposes the place to be part of *England*, and governed by the laws, and customs, of *England*.

Nobody ever heard of this writ going to *Jersey*.

Arguments deliberated upon, on deciding that the jurisdiction of the court of K. B. extended to the town of *Berwick* on *Tweed*.  
2 *Burr.* S. C.

1849.

The KING  
agt.  
COWLE.  
K. B.

The contrary doctrine to this would be absurd. For is this court to judge whether other judges do right, whose judgment is to be guided by other laws, and not by the laws of *England*? All the courts of *Westminster-hall* are to determine according to the laws of *England*, and, therefore, you could not do justice to places governed by other laws.

The question then is, whether *Berwick* is part of the realm of *England*, and governed by the laws of *England*?

*Berwick* was certainly once part of *Scotland*. It became *English* by conquest only, and remains in that situation at this instant. It was never incorporated into *England*. Conquered kingdoms retain their own laws, till others are given them by the conqueror: that this is so, appears by the case of *Ireland*, which never was governed by the laws of *England*, till those laws were given to it by charter in *Henry 7th's* time.

This writ then did not lie to *Berwick* when it was first conquered; when then shall it be said a jurisdiction attached to this court? Not in *King James the First's* time, because *England* and *Scotland*, though united under the same sovereign, still continued different kingdoms: not by the Union in *Queen Anne's* time, because provided against by that act of parliament.

What, then, (the gentlemen will say) are the courts of *Berwick* to be accountable to nobody for their proceedings? The same may be said of *Guernsey*, and *Jersey*; but, however, that does not want an answer: a commission may be issued by the crown to persons to judge according to the laws of the place. *Hale's History of the Common Law*, 183, 186, 7, 8. *Calvin's case*, 7 Reps.



21. 23.; and as to the cases which *Hale* puts, where the king is a party, which, he says, he may commence in his courts here; yet he does not say they are to be determined here. No, the record is to be transcribed, and sent there (as to our assizes) to be determined.

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The KING  
agt.  
COWLE,  
K. B.

If your lordship had the record here, what could you do with it? It must be tried in its proper county, a jury must be impannelled; but how can that be done at *Berwick*?

This is a mandatory, *remedial writ*, which cannot extend beyond the realm of *England*. *Calvin's case*, 23.

*Mr. Clayton*, on the same side.

The case of *Wales* is not like this, because that was originally part of the realm of *England*.

Though this be an indictment for assaulting the mayor, yet there can be no failure of justice, for there are several justices of gaol delivery, &c. in *Berwick*. But if the *certiorari* should go, there would be a very great failure of justice, because it would hang up the proceedings for ever, for the cause could be tried no where. 1 *Sid.* 281. 460. *Godb.* 387.

*Mr. Selwyn*, on the same side, urged, that the statute 8 & 9 *IV.* 3. requiring the party who sues out a *certiorari* to enter into a recognizance to procure the indictment to be carried down to trial at the next assizes for the county from whence it was removed, &c. cannot be complied with in this case; and, in fact, the recognizance the party has entered into, is to try it at the *Northumberland* assizes, which is not according to the statute.

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The KING

agt.

COWDELL

K. B.

The charter of *Berwick* was confirmed by act of parliament in the reign of *J. 1.* *Show.* 365.

The Chief Justice said, he never heard of any appeal to the king and council from *Berwick*, as is the practice from the plantations, and the *Norman Islands*, and is virtually given to the inhabitants of such of the king's dominions as are not part of the realm of *England*; nor, on the other hand, did he ever hear of error being brought in any of the courts here from judgments at *Berwick*.

The court also observed, that *Berwick* sent members to parliament long before the union, which they could only do by virtue of some charter: not by prescription, because it is a conquered country within time of memory.

It appearing by the charter granted in King *James* the First's time, that there were some other older charters, the matter stood over till those could be produced, &c.

Note.—Lord *Mansfield* said, he knew the opinions that were taken upon the point held, that *Wales* and *Berwick*, were included in the window-tax act, antecedent to 20 *Geo. 2. c. 42. § 3.*, though not named.

In *Easter term*, this matter came on again.

An ancient charter of *Ed. 4.* was produced, reciting two former charters of *Ed. 3.* and *Ed. 1.* (both which are lost) by which the corporation are to have the return of writs; and no sheriff, or other officer of the crown, are to enter but on default of the mayor. That they shall be governed by the same laws as they were in the time

of King *Alexander 2. of Scotland*,\* without any infringement, &c.

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The King  
vs.  
COWLEY  
K. B.

That 1 *Jac.* 1. they received the charter they are now governed by, which grants, that they shall enjoy all immunities to which they are entitled, as well by former charters, as by custom, or prescription. It then establishes a court of pleas for the borough, in which they may proceed according to the laws of *England*, or according to their own ancient customs. Then it gives them the same power to return writs in exclusion of the king's officers. Next it establishes a court of *oyer and terminer*, and gaol delivery (mentioning all capital offences except treason, which is not named), the same as in any county in *England*; and gives the coroner power to summon juries, &c. and to execute felons adjudged to death, according to the laws of *England*.

The case was argued upon these new materials, &c. by Sir *Richard Lloyd*, Mr. *Gould*, Mr. *Yates*, and Mr. *Selwyn*, against the *certiorari*, in three lights.

1. Whether *Berwick* is part of *England*, or not?
2. Whether it is governed by the laws of *England*?
3. If it is, whether the court will grant a *certiorari* under the particular circumstances of this case?

1. As to the first point, they repeated in substance what was offered on the last argument, and added, that; in the statute 21 *H. 8. c. 6. § 7.* there is a special provision as to the towns of *Calais* and *Berwick*, where they are considered in the same light, as acquisitions by

\* *Temp. Joh. & Hen. 3.*

1759.  
The KING  
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conquest, and as no part of the realm of *England*; and if not, then as a conquered country, it had no law but the will of the conqueror,\* till he gave them laws. It was a blank to be filled up only so far as he pleased, and its laws could no further partake of those of the conqueror's former dominions, than he had expressly given them.

By *Vaugh.* 414, it appears to have been the opinion of that judge, that *Wales* could not have been entitled to the laws of *England*† without the authority of some ancient act of parliament, since lost. So is Lord *Coke's* opinion in *Calvin's* case; and that *Wales* was not completely governed by *English* laws till the statute of *H. 8.* They urged further, that it must be so of necessity, for no conquered country can instantly partake of the laws of the conqueror's hereditary dominions, because they have no officers to execute them.

So here, there being no act of parliament to make *Berwick* a part of *England*, it was not, till the making of the statute 20 *G. 2.*, bound by acts of parliament, unless particularly named.

As to the case of *Crisp v. Mayor of Berwick*, 1 *Mod.* 36. 1 *Ventr.* 58., they cited *Salk.* 651., title "Trial," to shew that that case did not affect the present question.

2. They are governed by their own local customs, and all the charters are particularly careful to preserve this right to them of determining all differences within their own courts, which might take its rise from the situation of the town between the two kingdoms, on which account many of their special customs might have a reasonable foundation. So in the *Isle of Man*, it is death to steal a cock, or a hen, but not to steal a horse, because, from the

\* 2 *P. Wms.* 75. † *Fitz. Ab. tit. Assize*, pl. 382.

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 The KING  
 agt.  
 COWLER.  
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## NOTES OF CASES IN K. B. &c.

Mr. *Fateh* repeated the observation Mr. *Selwyn* made the last time this matter was spoken to, as to the recognizance, &c.; but the court said, that did not apply to this case, but was confined merely to proceedings at the quarter sessions, and not, as here, to those before justices of *oyer and terminer*. *Rea v. Fonseca, Trin. 29 & 30 Geo. 2. (1 Burr. 10.)*

Mr. *Norton, e conf.*, laid it down as a principle not to be disputed, that this court has a superintendent jurisdiction over all criminal jurisdictions whatsoever, whensoever established, or howsoever constituted; and whether this could be extinguished by express negative words, had never been resolved.

He relied much on the clause in 20 G. 2. c. 42., as a legislative exposition that *Berwick* was part of *England*.

That in spiritual matters *Berwick* had all along been under the jurisdiction of the bishop of *Durham*. So; by the militia act, it is considered as part of the county of *Northumberland*; and may, in fact, lie within it, though the sheriff of *Northumberland* does not return the writ for electing their members: no more does the sheriff of *Kent* as to the cinque ports, and yet they are within that county; and though they have privileges as great and as ancient as *Berwick* can boast of, yet *certioraris* go to them from this court upon every occasion.

One of the *Berwick* charters takes notice of their usurpations antecedent to that charter, but pardons them, and expressly provides that the attorney general shall bring no *quo warranto* on that account. Nothing can shew stronger, that they were then considered as under the jurisdiction of the king's supreme courts.

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 The KING  
 agt.  
 COWLE.  
 K. B.

As to the method of trial, there is no doubt but the court may order it to be tried in an indifferent county, notwithstanding the action, or crime, be of itself local; and this from necessity, which supersedes all positive laws whatsoever, and such an exception as this does but prove the general rule.

And, therefore, in 1 Mod. 36. *Crisp v. Mayor of Berwick*, in covenant (which is a local action), the court got over it by entering a proper suggestion on the roll.

As to precedents.

8 Jac. 1. (in a year after the granting the charter) an information was preferred against one *Hollison*, and others, upon the statute of uniformity, and process issued upon removing it hither by *certiorari*.

*Mich. 8 Ann.* Information in this court for an assault at *Berwick*, which case answers every objection as to the incapacity of this court to send it to trial.

9 Geo. 1. *Mandamus* to swear *Wilson*, and three others, churchwardens of *Berwick*.

In 1754. Indictment against *Moscroft*, and two others, for an assault, was removed hither by *certiorari*.

And at the beginning of the present parliament, several rules for informations for bribery in elections at *Berwick* were made absolute: and though they were not further proceeded upon, they shew the jurisdiction of the court.

The argument being gone through, the court directed it to stand for judgment till the first day of this term.

See 2 Burr. p. 850.

FOOT *agt.* STOKES.—K. B.

THIS was an action of debt on a bond, brought in the *debet*, and *detinet*, by the plaintiff, as executor of *M. B.* against the defendant. Defendant prays *oyer* of the condition, which was for payment of £4 every half year till £100 is paid, and pleads payment, for a long time, to the amount of £84; and that, on the 5th Nov., 1757, he paid £7. 4s. in full satisfaction of the bond, and all money due.

An executor may declare in the form of *debet* and *detinet*; and traverse either payment or acceptance in satisfaction.

The plaintiff, protesting that defendant did not pay, replies, that the testator did not accept the £7. 4s. in satisfaction, &c.

To this replication the defendant demurred, and shewed for cause, that the plaintiff should have traversed the payment in satisfaction, and not taken it by protestation, which neither confesses, nor avoids.

Mr. *Luke Robinson*, for the defendant, at the argument, took another exception, *viz.* that the action is brought in the *debet* and *detinet*, whereas it should be in the *detinet* only, as the plaintiff is an executor, and this he insisted was matter of substance. *Cro. Jac.* 554.

Mr. *Yates, e contr'*.

As to the last objection, it is now considered as matter of form only, and, therefore, the court will not take notice of it, as it is not assigned for cause of demurrer.



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 Foot  
 agt.  
 STOKES.  
 K. B.

As to the other objection, the acceptance in satisfaction is material. *Salk.* 627. *Carth.* 347.

Lord *Mansfield*, C. J.

1st. Either payment, or acceptance, is material.

2d. The *debet* and *detinet* are matter of form only.

*Denison*, J.

Since the act for the amendment of the law, it has been several times determined to be matter of form only.

Demurrer overruled.

### COLLINS *agt.* COLLINS.—K. B.

A set-off may be pleaded to an action on a bond for payment of an annuity, &c. and stoppage is equivalent to payment under  
 8 *Geo.* 2.  
 c. 24.  
 2 *Burr.* S. C.

DEBT on a bond, given by a son to his father, for payment of an annuity of £10 *per annum* (*inter alia*). Defendant pleads, that the plaintiff had received from him £500, being much more money than was due under the condition of the bond, and sets off that against the plaintiff's demands. To this the plaintiff demurred.

Serjt. *Poole*, *pro quer'*. insisted, that this was not a bond to which a set off could be pleaded, according to the 2d *Geo.* 2. c. 22. § 13. or 8 *Geo.* 2. c. 24 § 5.

The court conceiving some doubt, whether the defendant's plea answered the whole of the declaration (as to another matter not to the present purpose) the case

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agt.

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K. B.

growing payments, as there is in the 8 & 9 *W. 3.* the court might have been warranted in such a construction; but as matters now stand, if the plea is allowed, there is an end of the annuitant's security, for the plea is a bar, and discharges the bond.

Serjt. *Hewitt, e cont'*., denied this, and insisted that it would have no such effect, but was merely a bar to such cause of action as the annuitant then had, and would not prejudice a future action, when more should accrue due. That the judgment, as well as the bar, were both new, and introduced by this statute. The judgment is to be for so much, and no more, as shall appear due to the plaintiff; and is not for the penalty of the bond, as it was at common law. Besides, it is the annuitant's fault to bring an action for arrears, when he has been over paid, or (which is the same thing) owes more than he demands, which is the very case the act provides against, by introducing this bar.

Whereupon the matter stood over, for some days, for the consideration of the court, and then judgment was given.

Lord *Mansfield*, C. J.

On full consideration, we are all clearly of opinion, that this is a case wherein a mutual debt may be set off.

Consider how the case stood before the statutes of set-off. By the last clause of 8 & 9 *W. 3.* for preventing frivolous and vexatious suits, wherever there is a bond, or penalty, for securing any covenant *by any writing, or agreement*, &c. (in most general terms) the plaintiff may assign as many breaches as he can, and is to recover the damages proved on the breaches assigned, and has judg-

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age, the father obtained from him a bond for £7000, conditioned for payment of £3500. The father, by his will, left the son that bond, upon condition that he would give a contingent interest, which he might become entitled to on the death of a relation, to his younger brothers and sisters.

That relation being now dead, and the interest being devolved to the plaintiff, and he not having assigned it, an action was brought on this bond; whereupon the plaintiff filed his bill against the defendant *Heriot*, who had married one of his sisters, and others, to have the bond delivered up.

It has been argued,

1. That the eldest son was bound to provide for younger children, and stand in *loco parentis*.

This might be a doctrine agreeable to the *Roman law*, where the father had a right to sell his children *usque ad filium venundendi potestatem*.

But our law does not allow a father thus to shift off from himself the natural obligation he is under to provide for the younger branches of his family.

2. It was said, that if the bond was considered as voluntary, yet equity would not relieve against it, except in favour of creditors, &c. which is not the case here.

If a voluntary bond is given by a person unable to pay, the transaction would bespeak such weakness on one side, and such undue exertion of authority and imposition on the other, that I am inclined to think it is impossible such a transaction could be supported in a court of equity.

## NOTES OF CASES IN K. B. &c.

But this was not intended to be looked upon as a voluntary bond, but was on a supposed consideration of procuring the commissions; though I am at a loss to know how £2100 advanced could make the son a debtor for £3500. There was, indeed, no part of the sum to be considered as due, for the purchasing this commission was exactly the same as if the father had bought an estate in his son's name, in which case no parol proof could be admitted to prove it was not for the son's own use. The son was under the influence of his father, and paid as much regard to him as to the dictates of an oracle, otherwise a man in his senses would not have signed a bond of this kind, without consideration; when, if the obligee had put it in suit, the consequence must have been that he would have been thrown into a gaol.

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If I should hold this a debt, I should contradict all authorities of cases between father and son, and set a bad precedent; for by that rule every small sum which the father had allowed his son, during a time when he did not know the value of money, might become a charge upon him in his riper years.

8. It has been said, the son has confirmed this since his father's death; and there are cases where if the party *sublata causa* confirms, he has been held bound.

The case of Mr. *Spencer's* executors with Sir *Abraham Jansen*, was mentioned. But this case differs materially; for there the contract was only voidable *pro tanto*, for the excess. But this is, *ab initio*, void in a court of equity. It was a mistake on one side, an imposition on the other. There was not a grain of consideration from the father, nor is it to be considered as a loan.

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 CARPENTER  
 agt.  
 HERIOT.  
 CHANC.

The confirmation here too is only *fished out* from a loose expression in a letter, which might, or might not, be applicable to this matter. Mr. *Spencer's* was a solemn confirmation by a new bond. It does not go so far as to say, that he intended to make this void obligation good; but he only says, in a letter to Mr. *Heriot*, (he had written to him, as one gentleman to another, acquainting him that he was paying his addresses to his now wife, not to make an inquiry about fortune, &c.), "that upon the death of some relation," (not expressly this relation, upon whose death the contingent interest was to descend,) "the lady might be entitled to £500."

It appears, upon the whole, to me, that this bond was obtained under paternal influence. I therefore decree, it be delivered up to be cancelled, but without costs.

Sir JOHN ASTLEY, Bart. agt. YOUNG, Esq.—  
 K. B.

Terms of  
 abuse in an  
 affidavit filed  
 according to  
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 cause of ac-  
 tion.  
 2 *Burr. S. C.*

THIS was an action on the case brought against the defendánt, a justice of peace for *Wiltshire*. 1st count was for scandalous words: 2d count for a libel contained in an affidavit in this court, which the defendant had filed on his shewing cause against a rule for an information prosecuted against him by the plaintiff; in which affidavit were these words, "I should then have been de-  
 "serving of all that Sir *John Astley* has *falsely sworn*  
 "against me."

The defendant pleaded, that he made the affidavit in

1759.

FISH

agt.

HUTCHIN-  
SON.

C. B.

On ~~the~~ ~~assumpsit~~, the promise was proved as laid in the declaration, but it is found *not to have been reduced into writing*.

Qu. Whether it ought not to have been in writing, by the statute of frauds?

*Willes*, C. J., and the whole court, were most clearly of opinion, the promise was void; and they distinguished it from the case, where *A.* having brought his action for trespass for a tort, and not on a contract, (sounding merely in damages,) against *B.*; and in order to stay that suit, *C.* promises to pay *A.* £50, &c. if he will desist in his action against *B.*, that may be good, and is not a promise to pay *the debt of another*, as here it is, within the express words of the act.

*Vide* Lord Raym. 1085. *Buckmyr v. Darnall*, this case put by the C. J., *Rothery v. Curry*, Trin. 21 Geo. 2. C. B., same point determined on same distinction. v. 5 Mod. 205.

### SIMS agt. SIMS.—K. B.

After sentence given for contumacy in the Spiritual Court, this court will not grant a prohibition, but leave the party to his appeal. 2 Burr. S. C.

A WOMAN, libelled in the bishop's court of *Bath* and *Wells*, against a person whom she called her husband, alleging they were married in 1731, and co-habited for several years as husband and wife, till her husband treated her with cruelty, and then left her, and praying that he might answer these facts, and that she might be divorced.

He answered, that in 1742 he was married to *J. S.*, and

## NOTES OF CASES IN K. B. &c.

excepts to the former part of the libel which prays a discovery whether he was not married to the libeller.

The ecclesiastical judge overruled the exception, and was proceeding to excommunicate the husband for contumacy.

Mr. *Popham* now moved for a prohibition, as the discovery which was required to be made by the man tended to charge him with felony.

*Denison, J. (absente C. J.)* said it was proper to consider whether the remedy was not by appeal; and though the sentence was urged to be interlocutory, and in the middle of the cause; the court were clear that an appeal would lie.

However, *Denison, J.* said Mr. *P.* might mention it again, if he pleased, when the court was full.

And, accordingly, at another day,

Mr. *Popham* moved it again, and urged; that in all cases where inferior courts were guilty of excess of jurisdiction, this court would interpose, in order to prevent the ill consequences to the parties; that here, though the spiritual court had jurisdiction, and a right to call upon the defendant for an answer upon oath, yet they had been guilty of an excess in persisting to extort a confession from him after he had disclosed the special matter in his answer, by way of excuse, &c. *Cro. Jac.* 388. *Freem.* 296.

Lord *Mansfield, C. J.*

They have jurisdiction, and are the proper judges



1759.

SIMS

agt.

SIMS.

K. B.

whether the defendant has offered a good excuse for not answering; and if they have erred, your remedy is by appeal, to have that sentence reformed. Besides, this is after sentence pronounced; however, an appeal will stay further proceedings.

*Denison, J.*

- I still think, as at first, that this court have nothing to do with it; if the sentence be contrary to law, it is contrary to the law of the ecclesiastical courts, and to be reformed by appeal.

*Foster, J.*

I always took it, that where the spiritual courts had general jurisdiction, no prohibition would lie *after sentence*, but the party is put to his appeal.

*Wilnot, J.*, concurred, and said, they might appeal from this, though but an interlocutory sentence.

*Cur'.* It being a clear case, we cannot grant a rule to shew cause; therefore, take nothing by your motion.



COPPINGDALE *agt.* BRIDGEN and another.—  
K. B.

Process issues against a trader's effects, returnable but not returned till he had incurred bankruptcy by being two months in prison, held, *nulla bona*, to be a good return; a sum levied before the two months expired being vested by relation in the assignees, and the plaintiff having been liable to refund, had the money been paid him on the first return day.  
2 Burr. S. C.

THIS was a case reserved at the last sittings at Westminster, after Easter Term.

The action was case against the sheriff of *Middlesex* for a false return, in returning *nulla bona* to a *fi. fa.* delivered to him for levying £2050 of the goods of *John Debonair* at the plaintiff's suit—plea not guilty.

It was proved that the plaintiff sued out a bill of *Middlesex* against *Debonair*, the 2d of May, 1757, returnable 3 *Pasch.* That on the said 2d of May he was arrested upon that writ; and being so under arrest, was on the 4th of May charged with process out of C. B. at the suit of *Joseph Solomon*, on which day he was brought by *habeas corpus* to J. Clive's chambers, and committed to the *Fleet*, charged with both actions. That in Trin. 30 and 33 Geo. 2. the plaintiff obtained judgment against *Debonair* for £2000 debt, and £6. 10s. damages.

That on the 17th of June a *fi. fa.* issued to the defendants, returnable 3 Trin. (26th of June.) That on the 18th of June the defendants took divers goods of *Debonair* in execution, and levied thereof £292. 7s. That on the 5th of November, they returned *nulla bona*.

That *Debonair* was proved to have been a trader within the statutes of bankrupts, and remained in custody at the plaintiff's suit from the said 2d of May until and upon the 2d of July following, on which day he was discharged

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As to the consequences to the plaintiff, he could gain no property, but if the money had been paid to him, the assignees might recover it back again. *Rush v. Baker*, 2 Str. 996.

As to the sheriff, I admit the original seizure was ~~not~~ a trespass, as in *Cooper v. Chitty*, *Michaelmas*, 30 Geo. 2. but still he would have done something unlawful, and have been liable to an action by the assignees; and if his having acted in such a manner as to guard himself from their action, must lay him open to this, it is a very unfortunate situation indeed.

*Reply.*

The property was vested in the sheriff, before there was any act of bankruptcy committed.

As to Mr. *Yates's* case of a judgment reversed, that is void to all intents and purposes, as if it had never existed. But here, nothing *ex post facto* can vary the case.

Lord *Mansfield*, C. J.

This was made a case by the consent of both parties.

What stuck with both parties was, the execution being at the suit of the man who arrested the bankrupt, and thereby the means he took for the recovery of his debt preventing their own effect.

Any question which might have arisen as to the day of the arrest, and the day of the discharge being exclusive or inclusive, is, by the present state of the facts, out of the

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*Denison, J.*COPPING-  
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Taking all the facts together, I think this is a very plain case.

At the time the sheriff made his return, the matter of property was very clear. But it is said, he should have made his return at the day of the return of the writ, and that the goods were then the property of *Debonair*. If he had paid the money over to the plaintiff at that time, he had been right; but the controversy would then have arisen between the assignees, and this plaintiff.

The *veritas facti* here is as the defendant has returned it, and why should we presume the return made at the day when the writ was returnable, when the contrary is stated?

The case, in my opinion, is with the defendant.

*Foster, J.*

I think the return is true.

It is said that this doctrine of relation is a hard law; but I think not. The bankrupt-laws make an equal distribution, and we should further it as much as we can.

Before the return was made, there was a complete act of bankruptcy. Even if this return had been made on the 26th of June, still I cannot say that it would have been a false return.

*Wilmot, J.*

I have no doubt but this is a good return.

## NOTES OF CASES IN K. B. &c.

This is no difference between complex, and simple, acts of bankruptcy; but, in this case, the first arrest is eventually a simple act of bankruptcy, if the party lies in prison two months, by relation. Co

As to the question, whether this would have been a good return if made on the 26th of *June*, I confess I have some doubt, because there would have been no act of bankruptcy then committed, and it would be very hard for a sheriff to be subject to an action for a matter which might or might not happen, and was not under his control, or power. Br

I think this case, as it is here stated, falls directly within the meaning, and words, of *Jac. 1.*

Plaintiff nonsuited.

The KING *agt.* BOYAL.—K. B.

INDICTMENT against the defendant for not performing his statute-labour at the highways, at Sessions, An ir  
 charged, that *A. and B. being* surveyors of the highways ment  
 of &c. did appoint the 29th of *June*, to carry, and provide, when  
 materials for the repair of a particular highway, the same remed  
*being* of the six days, and that they being &c. at a convenient trodu  
 time before, *viz.* on the *Sunday* preceding, did give public statut  
 notice in the church, nevertheless the defendant, who on only,  
 the said 23d (*Sunday*) and from thence to and on the by 22  
 29th, &c. kept a draught, &c. well knowing his duty, but 2. c. 1  
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2 Br

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neglecting the same, did not send a draught, properly provided with two able men to attend the same, as he ought to have done, but therein wholly neglected, against the peace, &c.

Mr. *Vivian* sometime since obtained a rule to quash this indictment, unless cause.

Mr. *Winn* now shewed cause.

The first and second objections were, that it is not positively alleged, that this day was appointed by the surveyors, or that it was one of the six. Being surveyors, and being one of the six, is sufficient. *Rex v. Moore*, 2 *Mod.* 128. shews, that *existens* is an averment, and many other cases.

The other objection was, that no indictment would lie, the 22 *Car.* 2. having provided a particular remedy, by a penalty.

If the penalty be added to a common law offence, or to a statute-offence, by a subsequent statute, or by a subsequent clause in the same statute, or if the remedy does not extend to every case, an indictment lies. Here are three statutes, 1st, that of 2 and 3 *P. and M.* c. 8. by which four days' work is required, and stewards of leets are to inquire into offences against that statute, or, in default thereof, but not in the first instance, the sessions. 2dly, The 5th of *Elizabeth*, c. 13. gives the sessions, as I apprehend, an original power to hold plea of this matter, which must be by indictment, for it authorizes justices of the peace to make presentment to the general sessions of any default contrary to the statute of *P. and M.* upon which the justices are to assess such fines as shall be thought meet.

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it is certainly oppressive to proceed by indictment, and in the case of a new offense, it will not be suffered. 2 *Hawk.* P. C. 211. Here was no particular direction of the six days' labour before the statute of *Car. 2.*, and that statute does particularly direct it. It likewise provides a remedy, if it be disobeyed. Every act giving a penalty ought to be pursued in the prosecution. 7 *Rep.* 36. *Plow.* 206. 1 *Show.* 398. *Salk.* 43. *Palm.* 388. 2 *Ro. Rep.* 299. and in *Castle's* case, on 18 *Hen. 6. c. 11.* indictment for taking the office of justice of the peace, not having lands of such value, the same objection was allowed. So 3 *Keb.* 34. 3 *Mod.* 76.

Lord Mansfield, C. J.

This point was so lately before us that it need not be gone into now. That case, and indeed *Rex v. Davies*, was decisive. This was indictable before the summary proceeding was introduced by the statute of *Car. 2.* and that is cumulative.

*Being* surveyors, and the day *being* one of those appointed, is a sufficient averment that they were so. Besides, it is not of course to quash: if your objections can be supported, you may demur. But I do not like indictments, where there are summary remedies; unless the summary remedy cannot be had, it has the appearance of oppression.

This rule, however, must be discharged.



HAWKINS *agt.* COLCLOUGH.—K. B.

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TRESPASS, assault, battery, and false imprisonment. A re  
The defendant pleaded in bar, that the parties, after the of a  
action brought, had submitted all matters in difference to is ex  
the award, &c. of *A.* and *B.* provided they made their with  
award before the 14th of *August*, 1755, and if they did awa  
not make an award in that time, then to the umpirage of one  
*C.* to be made before the 13th of *October*, 1755. That *A.* othe  
and *B.* made no award; but that before the 13th of *Oct.* to be  
to wit, on such a day, *C.* made his award, reciting that a sum  
suit was depending between the parties, in which they inter  
had been put to great expense, and that they had agreed impl  
to refer all matters in difference between them to him, an a  
the said *C.* did award, &c. that each party should pay his dam  
own costs, and the defendant pay the plaintiff 5*s.* for one  
having made the first breach in the law. And the de tresp  
fendant avers, that he tendered 5*s.* to the plaintiff, in el  
refused to receive it. To this plea the plaintiff demurred, mut  
and the defendant joined in demurrer. final  
1 *B.*

Mr. *Anguish*, *pro quer.*

The general question is, whether the award is good?

I am to maintain the negative, which I shall endeavour  
to do upon these two foundations.

1st. For the uncertainty. 2dly. As not being final.

1st. An award must pursue the submission; here the  
submission is of *all actions*, and the umpire has not pre-



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tended to determine more than one, and that he recites to have been a suit then depending between them (without shewing the nature of the suit); now that suit might be concerning such a matter as could not be submitted to arbitration, viz. concerning a freehold, 1 Ro. Ab. 242. pl.

1. or concerning marriage, 252. pl. 10. The award is not in itself said to be *de et super premissis*, and the averment in the plea that it is, is not sufficient. Formerly awards were considered in the light of judgments, and no averment *dehors* could be received, and though it may now, yet that is only to supply defects, and not to make good an award otherwise entirely void, as appears from the 4th resolution in 1 Lord Raym. 246.

It is essential, in referring a trespass, ~~that~~ some damages should be awarded, else there is nothing referred, for every trespass implies a wrong. 1 Ro. Ab. 251. pl. 1. 3. Cro. Jac. 447. and the 3d resolution in Lord Raym. 246.

Now each is here to pay his own charges, and the defendant to pay 5s. for making the first breach in law, which is not said to be for damages, or by way of satisfaction.

2dly. It is not final, it does not expressly put an end to all controversies, nor award mutual releases. Awarding, that the party shall be nonsuit or discontinue, is insufficient. 1 Ro. Ab. 252. p. 16, 17. 2 Str. 1024. Cro. El. 904. 924.

Mr. Caldecot, *e contr'*.

As to the 1st point. A general reference of all actions is well satisfied by an award touching one particular action, and no other shall be intended to be depending.

## NOTES OF CASES IN K. B. &c.

8 Co. 98. *Baspole's case*. Here it must be intended that the suit he mentions was the present.

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The case in Lord Raym. 246. is by no means applicable, for the award there was, that the party should pay in his own right, though he only entered into the submission as attorney for another.

It is said this award is not mutual. It is sufficient in trespass to award damages to the party injured, which operates as a satisfaction, and may be pleaded in bar to a future action, though it would be otherwise in debt on a single bill, there the award of payment would not be good, because payment is no good plea to such a specialty. *Hob. 49.*

To 2d point.

Surely it is final, and determines all that was submitted to him. 1st, as to costs, he directs each party to pay his own: and 2dly, as to damages, that the defendant should pay the plaintiff 5s. All this is quite plain, and shews great good sense, though not much learning; and indeed the umpire was but a cobbler.

He declares that to be *his determination*. Awards are to be construed according to the intention of the arbitrators, and it is plain, that this honest man intended to put an end to the matters in difference between his neighbours.

Lord Mansfield, C. J.

Awards are now considered with greater benignity, and latitude of construction than formerly, as they are made by judges of the parties own choosing, and with a design

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to prevent more expensive litigations. And this cause seems very proper for an arbitration, being only a trifling battery. I agree, that it is of the essence of an award, to be both certain, and final, because it would otherwise beget, instead of put an end to suits: but impossible, or improbable, presumptions are not to be made, to overthrow awards; as here, to suppose a dispute of lands, treason, matrimony, felony, &c. These would be extravagant intendments. The umpire here heard one action; *he refers to the submission, and makes an end of it.* If there were other suits, they should appear, and not be presumed.

2d. As to the finality of the award.

The arbitrator had two things to dispose of, 1st, costs; and 2dly, damages.

As to the costs, he seems to have thought both parties to blame, and therefore directs each party to pay his own costs. As to the damages, the defendant is to pay the plaintiff 5s. for having made the first breach in the law, which is the same as if he had expressed it to be in satisfaction, and it might be so pleaded in bar of a future action.

*Denison, J.*, observed, on the 2d point, that though there had been no satisfaction, yet it is now settled, that it would be good; but here, even that is not an objection.

*Foster, J.*, concurring, demurrer overruled, and judgment for the defendant.

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3dly. Awards are to be liberally construed; they may be good in part, and bad in part; the same award may contain matters quite distinct, and independent.

To apply these general rules to the present case. The declaration says, the award was for the defendant to pay the plaintiff a debt of £48. 11s. 10d. and his costs; the award given in evidence is the same as to the debt, but contains further, that the defendant shall deliver up a note for seven guineas to the plaintiff, this, being also in his favour surely cannot hurt him, though he did not set it out.

The declaration says, it was to be paid in satisfaction of *the particular action then depending*, the award given in evidence was, in satisfaction of *all suits*: no other shall be intended; but further, the declaration here avers there was no other depending. The declaration is, that, on payment, *the suit* should cease, and the parties release; the award in evidence is, *all suits* should cease: but it is averred there was no other, and indeed no other than that was referred by the rule of *Nisi Prius*, therefore pleaded according to the operation of law.

Mr. Anguish, for the defendant.

There are two points, to shew the evidence did not maintain the declaration.

1. An omission in the declaration. 2dly. A mistake in it.

1st. It does not mention, that the award was, to deliver up the seven guineas note, which seems to have exceeded the bounds of the arbitrator's authority, which must be

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which must confine it to that cause of action referred to the arbitrators by the rule of *Nisi Prius*; but, in this case, he has likewise averred there was no other action then depending between the parties.

*Denison, J.*

I am of the same opinion. I think that the plaintiff needs not set out any more of the award in this action than is necessary to found his demand. 1 *Leon.* 72. *Lit. Rep.* 312. *Register*, 111. 1 *Salk.* 72. *Lord Raym.* 715. But in debt on the arbitration-bond, for the penalty, upon the plea, no award made, the plaintiff must, in his replication, set out all the material part of the award, relating to either party, but, according to *Holt's* opinion, may omit matter that is totally immaterial, because, in fact, no part at all.

2dly. As to the release, it is no variance, and though the award be, general releases of all actions, a tender of a particular release of the action (where, in fact, there was but one) would be a good performance; and here it is averred there was but one; but, even if this averment was out of the case, we could not intend there were more actions depending, but the defendant should have shewn it.

*Foster, J.*, concurring in omnibus, judgment for the plaintiff.

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2. That the surveyor was the witness to prove not only the service of the notice, but also the fact, that there was not sufficient in the waste, &c.

Answer. The fact does not necessarily appear to have been so in this case; for the order is, that he gave full proof to the court, which might be by others. But if not, he was the proper officer, and the evidence by him sufficient.

3. That he is made the judge to estimate the damage.

Answer. The act appoints it: besides an appeal lies to the sessions, who are to settle the damages in such cases.

4. The notice is not agreeable to the act; it should be both to the owner and occupier.

Ansr. Then the word *and* must be understood.

The words of the act are complied with; and, I submit it, that it was not the intention of the legislature, that notice should, at all events, be given to the owner; because being a summary proceeding for public utility, and only six days notice required, the owner may reside in places remote, or out of the kingdom. *Walter v. Rumbold*, 4 Mod., in construction of the statute of 2 W. & M. as to five days notice of distress, giving it to the occupier is sufficient; and as to any aid from the latter part of the act, 29 G. 2. which gives recompense to both owner, and occupier, that is where both are damaged.

5. The notice is said to have been given to the occupier, or left at his house.

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contrary to natural justice, to remove him from his place of residence, without notice.

3. It is not enough, that nothing bad appears on the face of their orders, but, if they have omitted any necessary circumstances, in which (had they been set out) there might be error, the order must be quashed; because the court will intend nothing in matters of jurisdiction, but require it to be fully set out, as this is the only way they have of exercising their general superintendent jurisdiction over inferior courts, and their proceedings. Orders of justices of peace in this summary way, may in some respects be more or less favourably construed, according to the equitable circumstances of the case; but this general principle extends to them, namely, that this court will not intend any thing that is matter of jurisdiction, as was fully laid down by *Ld. Hardwicke*, C. J., in the case of *Chelsea*, and *Stepney*. But in the present case, there are no equitable circumstances, but the power is in derogation of common right, and to deprive an owner of his dominion over his own, contrary to the nature of property:

As to the objections.

1. As there never was a case before the court, on this point before, in an order of this sort, no express authority can be produced, but arguments from cases analogous.

Orders of removal must set out the pauper's name and addition, as spinster, widow, &c. *St. Mary Stratford v. Long Stratford*. So exceptions to a poor's rate, for leaving out several persons, must particularly name them. *Rex v. Abingdon*, *Hil. 27 G. 2.* And as to the name of office being more proper, because it prevents abatement,

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7. They order recompense for the damage, or materials, &c. which is too narrow, for they are to allow for both.

Mr. Norton, on the same side.

There is an evident necessity from the plain construction of this statute, that two things should be disclosed by the justices' order to give them jurisdiction. 1st. Notice to both owner, and occupier, because the property of both is to be affected. 2dly. A precise adjudication that there were not sufficient materials in any waste, &c. All points necessary to give jurisdiction must be adjudged. 18 *Eliz.* of bastardy, enacts, that justices of peace shall take order to punish the father, &c. They must adjudge him to be the father, and only reciting that he is so, is ill.

So 13 & 14 *Car.* 2. which affects the liberty, as this does the property, of men, has general words, "on the complaint of the overseers, &c." yet it is necessary to adjudge, 1st. the complaint, 2dly. being likely to become chargeable, 3dly. that it is the settlement. 2 *Salk.* 492. *Str.* 77. and a multitude of other cases prove this.

So 11 *G.* 2. against fraudulent removals of goods to prevent distresses, the necessary facts must be adjudged: and this principle runs uniformly through all the cases of orders made by justices of peace, or other inferior jurisdictions.

If no notice was given to the owner, how easy would it be, through the connivance, or negligence of the tenant, to ruin the inheritance; whereas, the owner is principally to be considered, and, if damage is done to the soil, he may maintain an action for it, though there be a tenant for years. So, on the other hand, if the owner alone is summoned, without the occupier, the tenant may be in-



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sufficient, for this is a kind of sacrifice of private property to public utility, and therefore no minute objections should be received, that tend to overthrow the end proposed; and, in many cases, it would be impossible to give the owner notice; he may live remote, the title may be disputed, the estate may be in trustees, &c. and the words of the act are, giving *him* notice, or *leaving it at his place of abode*, which is most properly applicable to the occupier only. But there are several material, substantial, objections to this order. If the sessions had authority to act as they have done in this case, it would be the most arbitrary power in the world; but, though very extensive powers are vested in them for carrying on the purposes of the act, yet must they be exercised under proper guards, and restrictions.

1st. There must be a necessity, and that must appear.

2. The species of materials wanted must be mentioned in the notice, and some evidence given that there is a prospect of finding such materials in the ground.

3. The particular fields, or closes, must be mentioned, and described in the notice, that the party may have an opportunity to come in, and shew in excuse, either that there were materials of that species to be met with in some waste, or common, &c. or that the place they propose to enter is a garden, plantation, &c. (which are excepted by the act) for, in either of these cases, the surveyor would have no power. But, as this order is worded, it extends to all kinds of materials, and over all parts of this large farm, so that it is impossible for the party to defend himself.

Again, the form of the award of satisfaction is also

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The KING *agt.* WILLIAMS.—K. B.

An information quashed, brought before the Ld. Mayor, on the st. 1 *Jac.* 1. 422; and held, that the proceeding should have been by indictment.  
1 *Burr.* 8. C.

THIS was an information against the defendant, before the Lord Mayor, two aldermen, and the recorder of *London*, at their sessions, for having saddles of leather not well tanned. Vide 1 *Jac.* 1. c. 22. § 29. 31, 32, 33. 44. 46. 50.

The information being brought up by *certiorari*, Mr. *Gould* moved to quash it, on the following objections.

1st. If the proceedings in this case are to be considered as before the Lord Mayor singly, then they are bad on that account, his power extending only to red, and unwrought, leather.

2dly. If the proceedings should be at the sessions, they ought not to have been in this summary manner, by information, but by indictment.

Mr. *Norton*, Mr. *Williams*, and others, *e contr'*.

1st. That this was an information before the Ld. Mayor singly, and the act of parliament must mean to authorize such a proceeding, by naming the Ld. Mayor, because he is not a person whose presence is essential to the holding of the sessions for the city.

2d. The jurisdiction given in this case to the Ld. Mayor is not confined to the limits of the city: how then can a grand jury at a city sessions, present such offences against this statute as may arise without the liberties of the city?

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said, the proceeding cannot be by indictment, because the authority of the city magistrates extends three miles beyond the limits of the city. But, by this statute, they have a power to inquire by their jury, of any of these offences committed within the extent of those three miles.

This is the case in prosecutions for breaking down turnpikes, against smugglers, for foreign treasons, &c. and yet in those instances, the oath of the jurors is not altered.

Informations, in the court of *Exchequer*, for condemnations in *rem* are as old as the court itself, it is by the common law; and that manner of proceeding there is necessary, because a seizure may be made of goods belonging to nobody knows who, and which no one will care to own. But no such information occurs in any other court, besides the *Exchequer*. The goods here may be forfeited, in consequence of a conviction on an indictment; but nothing in the act hints at a summary jurisdiction.

*Denison, J.*

I am of the same opinion.

We have always quashed indictments, where the court taking them has no jurisdiction in the matter; as in the case of indictments for perjury at a quarter-sessions; and the court puts their reason in the rule, that it is *pro defectu jurisdictionis*.

The question then is, whether, here, a proper jurisdiction is exercised? Now I apprehend, that the act of parliament never meant the proceedings should be before the mayor *eo nomine*. All the parties to whom power is

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her to a place called the round-house, in St. Martin's in the Fields, and then and there delivered her to the defendant, so being the constable of the night, and left him in charge with her; *so being such loose, &c.*

On the trial; the defendant was found guilty.

It was now alleged, in arrest of judgment, that it is not sufficiently charged, that the defendant knew that the woman was a street-walker, &c. as described in the indictment.

Mr. Norton, in support of the indictment.

This is a slight objection after verdict, when every thing is to be presumed, and the defendant entitled to no favour.

No technical terms are necessary to describe such an offence as this is. It must be such a description, that the defendant may know what he is charged with, and to defend; it must be so certainly charged, that, if he be acquitted, he may not hereafter be indicted for the same; but one thing more is necessary, and that is, it must be such a charge, that the court may see what judgment to give.

Cases may be cited where, in escapes, it has been held you ought to set out the commitment, &c. but this was not a commitment, only a delivery from the watchmen to the constable. Then it is objected, that it does not appear, that the constable knew her to be a loose, &c. because it is stated, that he was charged with her *so being* &c. instead of *as being*, or *for being*. The court, in late determinations, have not been so rigidly critical in weighing

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a traitor, have been sufficient to make the defendant answerable for the consequences of the escape, *i. e.* capitally?

*Foster, J.*

The case of *Fell* was a case of high treason, in which more strictness is required in the indictment than in the case of a misdemeanor. It appears here, that the watchman did his duty in apprehending this woman, and delivering her to the constable, who ought to have kept her till the morning, and carried her to a justice, instead of which he takes upon him to discharge her. This is the offence charged by the indictment.

*Wilmot, J.*

Even supposing the words *so being* only an averment of her being so, I think it is sufficient. But I think it an averment, that she was charged as being so. Whether there was any charge, or no, if a person be brought in at that time of the night, and the constable, on his own authority, discharges her, it is an offence.

Judgment *pro rege, absente C. J.* and *Denison.*

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The KING agt. ROBERT SMITH.—In the Duchy.

The Duchy Court, a court of revenue only, not privileged to bring up a prisoner by *hab. corp.*;

THE defendant had been convicted, at *Lincoln* assizes, on an indictment for a misdemeanor, and was fined £100, and committed to *Lincoln* gaol, for not paying the fine. He obtained an *habeas corpus* from the *King's Bench*,

a motion in K. B. to transfer, &c. to be founded on cause.

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The KING  
agt.  
SMITH.  
Duchy.

Afterwards, in *Hilary* Term, 33 *Geo.* 2. 1760, the defendant being brought up, by a rule of court, from the *Marshalsea*, into the court of *King's Bench*, Mr. *Roper* moved, that he might be committed to *Newgate*, as the king had a right to choose his prison; and it was said, that this was the constant practice of the court of *Exchequer*.

But the court (*absente* C. J.) held clearly, that it ought not to be done of course, but that the application should be grounded on some special cause. That, as the defendant was a prisoner in execution, he was not entitled to the benefit of the rules, but ought to be confined in close custody.

On another day, when the C. J. was in court, Mr. *Roper* mentioned this matter again, when Lord *Mansfield*, after conferring with the other judges, was of the same opinion with them, that this motion was not of course.

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LISTER

agt.

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veyed to him in the words of the will, but to be settled on him in strict settlement; for that it was, plainly, the testator's intention to make him tenant for life only, and that he used the words *heirs male*, in the limitation to his issue, as words of purchase only, and not of limitation; that this was apparent from his using the same words in that sense, in the subsequent limitations, to the *heirs male* of the defendant, and the other subsequent limitations; where, as there was no limitation to the defendant, and the other people named in the will, previous to that to their heirs male, those heirs male could not take, unless by purchase.

The Lord *Chancellor*, however, was of opinion, that it could not be an executory devise, as the devisee was then in being; but amounted to a devise of his whole estate in the lands, out of which a term of years had been first taken, and, therefore, that the plaintiff was entitled thereto immediately, subject to that term, and the freehold was vested in him, and did not descend, as the defendant would have it, to the heir at law, during the term. His lordship was likewise of opinion, in favour of the plaintiff, on the other point, that the premises ought not to be conveyed to him in strict settlement, for that he was, clearly, tenant in tail, both of the lands of which the testator was seised, and also of those which were to be purchased, with the moiety of the profits, after the 20 years; for that wherever an estate is devised to a man for life, with a subsequent limitation to his heirs, or heirs male, or the like, the court will always construe it, as if it had been to him, and his heirs, heirs male, &c. That, in the case of *Backhouse v. Wells*, 1 Eq. Ab. 184. 2 *P. Williams*, 476. S. C. cited, the court held, where the devise was to a man for his life only, without impeachment of waste, and a subsequent limitation to his issue male, and to the heirs male of such issue male, that the devisee took only an estate for life:



*At the Rolls: before Sir JOHN STRANGE, Master of the Rolls.*

ALEXANDER *agt.* HOLLAND.

A simple contract creditor has no claim on the freehold, whose debt is secured on another part of the testator's estate.

One *Holland* purchases of *Lincoln-college*, in *Oxford*, a copyhold-estate, for his own life, and that of the plaintiff's son, in succession, (being part of a manor in which widowhoods were, by the custom of the manor, annexed to the copyholder's estate), and signs an agreement between him and the plaintiff, that, as £100, part of the fine which he had paid the college for his estate, was advanced by the plaintiff *Alexander*, his son was to have the estate after him; and, in case that son should die, *Alexander* was to be at liberty to put in the life of any other of his children in his room, paying the charges; or, if he should think fit, he was to be repaid the money, with interest at 4 per cent. *Holland* dies, leaving a will, wherein he takes notice of this agreement, or memorandum, and subjects his copyhold-estate to the payment of the money, if it should ever be demanded, and afterwards gives a small freehold which he had, to his wife in fee, subject to some particular incumbrances charged thereon. *Alexander's* son dies soon after, on which, he, not being able to agree with the college for a new lease, files a bill to be repaid the £100 out of *Holland's* estate, with interest.

His honour held the meaning of the said memorandum

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 CHURCHILL  
*agt.*  
 SMALL.

tion, that he could not dispose of them by will ; that they were liable to his debts, though not till all his other assets were applied, but then they might be prayed in aid : that they might, in his lifetime, be taken in execution on a judgment against the husband, and would be forfeited by his outlawry, &c. That though he could not ordinarily dispose of them by his will, yet, as he had done it in this case, if the wife insisted on them as her paraphernalia, she must relinquish whatever else she claimed under the will ; for she must abide by the will in toto, or not at all. That it was at her option, whether she would be content with the use of them during her life, together with the other provision the will had made for her, or have them absolutely as her paraphernalia, and forego all claim under the will, like the case of a devise to an eldest son of a fee-simple estate, and of an entailed estate to a second son, if the eldest son claims the entailed estate, as heir under the entail, he must forego all claim under the will to the fee-simple estate. That a man must, in all cases, abide by the whole of a will, or have no benefit from it ; and where a husband had taken upon him to dispose of his wife's paraphernalia by his will, as here, the wife must relinquish all claim under the will, or submit to that disposal.

There was another question arose on the same will : the testator having given a legacy of £500 to his sister, to be paid within twelve months after his decease ; but, if she should not then be living, he gave the same over to his daughter, &c. The sister was alive at his death, and the executors were about to have paid her the legacy, but she died before payment ; and the doubt was, whether this legacy should go to her representatives, or to his daughter, to whom it was bequeathed over.

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 BARRET  
 agt.  
 LUN.

rate; but, I think, the testator's intention is plain, and that the court may construe it accordingly. He lived, I find, about a month after making his will, and probably might then be ill, though there is no proof of it in the case: I see the will is proved within six weeks after the date. In order to construe it rightly, and find his intention, the circumstances of his family, and estate, must be considered. As to family, he had a wife, a son, and a daughter; as to estate, he had a small freehold; he had likewise some personal estate; and it is natural to think, he had some intention of providing for every part of his small family, since he has declared an intention of disposing of the whole; and though I agree that, notwithstanding this, if there be any chasm, it must go to the heir; yet that declaration is a reason to give his words the utmost latitude. After this declaration, he gives some small legacies, and then gives his wife all his personal estate to her own use and disposal. If this be taken as a specific legacy, and exempt from debts, or, as I rather think it, a bequest of the residue, in either case, the children could take nothing of it; then he gives her an annuity of £30 out of his real estate; and, in case she marries again, he declares his intention to be, that this £30 a year should come to his child, or children; the word *come* seems to shew, the testator understood it would, by that means, fall into the whole. He goes on: and in case either of my children shall die before the other, then all the rest of my real estate shall go to the survivor of them, and the heirs for ever, &c. The intention of this clause seems to be, that the £30 a year should fall into the estate on the event mentioned; but did it rest there, it would not be sufficient, as the implication is not a necessary one: it would carry it beyond the case in *Vernon*, though that went further than the case of *Gardiner v. Sheldon*, Eq. Ab. 197, & *Vaug.*) I think the case in *Vern.* a right determina-

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BARRETT

agt.

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he had but two, if one died, a child only, and not children, could survive; their surviving, therefore, in this case, could not relate to each other, but to the testator.

This, I think, is the most consistent construction, and makes a provision for both the children: what is contended for on the other side (for the defendant, the son, which was, that the estate was undisposed of by the will, and descended to him as such) would leave the daughter, the plaintiff, wholly unprovided for.

The consequence is, that the decree must direct an account of the annuity, and of the rents and profits, the surplus whereof the plaintiff, and the defendant, were entitled to, in equal shares.

The annuity being devised to the wife, payable yearly, and it appearing she died within the year, his lordship said, she could not be entitled, and nothing was allowed for it.

*Note.* His lordship was desired to declare, whether they were entitled as joint tenants, or tenants in common, in his decree, but he declined it.

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BATTIS-  
COMBE

agt.

SYNDER-  
COMBE.

Mr. *Solicitor General (Murray)*, for the plaintiff, began with saying, it would be proper to divide the lands in question under three denominations; lands out in leases yet unexpired, lands in fee, and possession, and lands which have been for sixty years reputed freehold, were enjoyed by the devisees for life as such, and as such were conveyed to the defendant, though it is now pretended, the interest in them is only a term of years.

The general question is, whether the plaintiff, as heir *a parte paternâ*, or the defendant, as standing in the place of the heir, *a parte maternâ*, is entitled?

My Lord *Chancellor* said, the question was a legal one, and, therefore, directed the title to be tried by ejectment; and that no satisfied term, leases unexpired to tenants, &c. should be set up against the plaintiff.

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GLEED *agt.* GLEED.

Under a will by which lands are charged with all debts, the executrix to whom a residue, after payment of legacies, is bequeathed, claims the personal effects as a specific legacy; but held, that the personals are first applicable, and the land, a security afterwards, to the amount charged upon it.

**A. MAKES** her will, and devises thereby a particular estate for life to her heir at law, *Mary Dunckley*, and in case she should die under twenty-one without issue, she gives the same to *B.*; she paying thereout certain particular sums, to several persons therein named: she then goes on, "*I charge my real estate at M. with the payment of* (two particular debts, mentioning them, and to whom they were due) *and all other my just debts, and, subject thereto,* she makes a general devise of her real estate to *C.* for life, remainder to the plaintiff, &c. paying thereout, &c. She then gives four legacies of £5 each, and one of £20,

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 GLEED  
 agt.  
 GLEED.

The question is not between us and creditors, for, as to them, we do not dispute, but that the personal estate is liable; we only contend, that the real estate is liable to make us satisfaction, and that such was the testator's intention. In the first part of the will, she gives an estate to her heir at law for life, and on the event of her dying without issue under twenty-one, she gives the same to *B.*, she paying thereout certain particular sums; and then, after charging her real estate at, &c. with the payment of two particular debts, and all other her just debts, and subject thereto, she gives the same to *C.* for life; remainder to the plaintiff, paying particular legacies thereout. It is very certain, a man may exempt his personal estate either by express words, or by implication; 1st, by saying, that, having made provision for his debts out of his real estate, he gives his personal; or, 2dly, by implication, as in the case of *Bamfield v. Wyndham*, Prec. Chan. 101., by devising the real estates to trustees to pay debts, &c. Your lordship's determination in the case of *Lord Inchiquin v. O'Brien*, was grounded on this, that the charge was only a general one, and the bequest of the personal estate was merely of a residue. As to the legacies here, which are charged on, and to be paid out of particular estates, by the word paying, &c. no person who took an estate under such conditional words, ever applied to this court to be indemnified out of the personal estate first applied; but here it is expressed to be the testator's intention, that certain debts should be paid out of the real; and, if your lordship thinks those debts ought to be paid out of the real, her intention is no less evident, that all the rest of her just debts ought to be paid out of it likewise, the same charge comprehending both; and, therefore, we hope, this will be considered as a specific bequest of the personal estate, subject only to these few pecuniary legacies which are not charged on the real. *Adams v.*

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GLEED

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GLEED.

the precedents. The general rule, it is said, is, that there must be express words to discharge the personal estate from the payment of debts, and legacies, for which it is the natural fund; but, I think, it is too much to say, the personal estate shall not be exempted without express words, for where there is a manifest intention in the testator to exempt his personal estate, the court has and ought to hold the real first liable. It is observable here, that in the same clause by which the testatrix appoints her executrix, which subjects her to the payment of debts, she gives her this residuary legacy. Now debts, general legacies, and specific legacies, are to be first taken out before we can come at a residue. The ground the court went on in the case of *Wainwright v. Benlowe*, is, the direction to sell for the payment of debts, which gives the residue of the money arising by that sale to the sons; for had the personal estate, in that case, been first applied, the whole real estate, instead of the residue of the money arising by it, would have gone to his sons, which was not his intention; and there, likewise, was a proper devise of the personal estate to his wife. But the general distinction is, between subjecting a real estate to the payment of debts by way of charge, and a devise of a real estate to be sold for that purpose. Where it is by way of charge, the court usually considers it as a security; yet, notwithstanding it is by way of charge, if the testator afterwards gives all his personal estate by any certain description, which shews it to be his intention to pass it as a specific legacy, there may be cases where the court has thought the debts payable, in the first place, out of the real; but, if the subject of the bequest of the personal estate is a residue, the debts, and legacies, must be first taken out of it.

Upon this will, however, I think, there are some legacies

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and legacies (other than those which are charged on the several real estates by the word *paying*, which, if the contingency should happen on which they are to become due, are to be paid out of the particular real estates only on which they are respectively charged) in a course of administration; and, in case the personal estate proves deficient, the residue are to be satisfied out of the particular real estates on which they are charged, the other parts of the real estate being exempted. The particular creditors named in the will, to have no preference out of the real estate, after the personal is exhausted, till the other creditors are equal. The real estate, if the personal is deficient, to be sold, or mortgaged, to make good the deficiency. All parties to have their costs out of the estate distributively, such part as relates to the real to come out of the real, such part as relates to the personal to come out of the personal.

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GAWTHORNE agt. MEYMOTT.

The court shewing grounds for doubt, whether a clergyman could be a bankrupt, directed the point to be tried at law.

THE defendant, *Meymott*, who was a clergyman, and incumbent of two livings, carried on likewise a considerable trade in the manufacture of earthenware; and a commission of bankruptcy being taken out against him, the plaintiffs were his assignees. The parson had applied by petition to supersede the commission; but the court dismissed the petition, without prejudice to any remedy he might have at law. The present bill was against the trustees, to have a voluntary settlement the parson had made of his effects set aside, on a supposition of his being a bankrupt before the execution of it. The only question



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 MOUS.

But it appearing, by affidavit, that the defendant could not have a copy of the bill till the time for answering was out, his lordship dispensed with the rule.

26th July.

———— agt. LADY FALMOUTH.

Order for examination on interrogatories, whether a party purchased knowing of a decree, &c.

AFTER a decree against the defendant, she made a bill of sale of her goods to her son, Mr. *Edward Boscawen*, in consideration of a sum of money mentioned to be paid her by him, to whose house they were accordingly removed, before the plaintiff could get a sequestration. The Chancellor now made an order absolute for examining Mr. *Boscawen*, on interrogatories, as to the reality of the purchase, and whether he had not notice of the decree (though, on shewing cause, he had made an affidavit, that he really paid the money which was the consideration of the bill of sale, and acknowledged, he had heard of the suit, but knew nothing of the particular proceedings in it), for as the defendant kept out of the way, to avoid being served with an order *nisi* for sequestration, and the plaintiff was by that means prevented from obtaining sequestration, the Chancellor said, he would not suffer the orders of the court to be so eluded; and though a purchase without notice of the decree, would be valid, yet he would give the plaintiff an opportunity of making more particular inquiries into it.

*Michaelmas Vacation, 27th Geo. II. 1753.*

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*At Lincoln's Inn Hall, before the LORD CHANCELLOR.*

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ROAN *agt.* GALLY.

Motion to supersede an original writ, on the ground of its being antedated, in respect to the day on which the actual sealing and delivery of it took place, refused.

MR. COX moved to supersede an original writ, which was tested the 6th, but not sealed till the 19th, as being antedated to avoid the statute of limitations; and it appeared, that if the original was to stand as of the 6th, it would be seven days before the expiration of the time allowed by the statute of limitations; but if of the 19th, it would be five days after. The foundation of this application was an affidavit, that the clerk of the person who sued it out had told the deponent, that the instructions for it were not left with the cursitor till the 16th; and that the cursitor, who had been applied to for his certificate of the time when he received the instructions, had refused to give it.

On the other side, an affidavit of the clerk was read, denying he had ever said what he was charged with by the other affidavit. It was admitted, the writ was not sealed till the 19th; but, to support this practice of making originals bear teste before the day they were sealed, was cited the case of *Price v. The Hundred of Chewton*, 1 P. Wms, 437., on the statute of Hue and

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agt.

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in doing it: facts of this kind must be proved as other matters of fact are.

And, as the very foundation on which this application was made is positively denied, let the defendant pay the plaintiff the costs of this application; and let the plaintiff pay the curitor (who had been complained of for refusing his certificate) for his attendance, and be allowed it again in the costs he shall receive from the defendant, in order to discourage applications of this kind.

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KENNEDY *agt.* KENNEDY.

The court will not grant an injunction to stay proceedings to repeal letters of administration, on a suggestion that a judgment will consequently be released, &c.

*Mr. Attorney General* moved for an injunction to the spiritual court, to stop their proceedings in a suit instituted there in order to repeal letters of administration formerly granted, and to have new ones granted to a woman who was, in fact, the intestate's next of kin (but, when the administration was granted, was thought to be dead), suggesting, that this woman was very poor, and should the administration be granted to her, she would probably release a judgment which the present administrator had obtained for a considerable sum, which was very near, if not quite, the whole of the assets. But the Chancellor denied the motion, saying, he would never stop the proceedings of the spiritual court in a matter properly within their jurisdiction; nor presume that a person will do wrong merely because she is poor; nor that the spiritual court will not take care to have proper security, when they grant administration: and, if she should release, you will not only have your remedy against the

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Mr. ~~Wentworth~~ <sup>Wentworth</sup> insisted, that his practice was dangerous to have the countenance of the court; and he hoped, there was a sufficient foundation for this application to support the depositions.

The motion was opposed by the Attorney, and Solicitor General, who insisted, that nothing was more frequent than to allow witnesses, in a court of law, the use of minutes to refresh their memories; that the only circumstance which seemed to distinguish this case from that, and to give a colour to the present application, was the witness's employing the plaintiff's attorney to digest her memorandums; but, there could not be much weight in that circumstance, when it was considered, that it was not pretended, there had been any tampering with the witness, and that she had carefully altered these papers, wherever the attorney had mistaken her meaning; that she swears positively to the truth of every part of them; and though it might be improper to write the whole of a deposition before examination, yet, where a man is to be examined to a great number of dates, &c. it was very necessary to have some helps of this kind.

Lord CHANCELLOR.

Whether there has been any tampering or no, I know not; but I know there has been a great mistake, both by the parties, and commissioners, who, however, did right, after their mistake, to lay it before the court. Should the court connive at such proceedings as these, depositions would really be no better than affidavits; for, should a witness be permitted to use a paper (especially one drawn up by the attorney of one of the parties, though from memorandums furnished by the witness), I might as well let the attorney draw an affidavit for her, and use that instead of a deposition. She insists, indeed, that she

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**agt.**

is a general rule as to those writs, that if a man is resident within any part of the king's dominions, where there are ordinary courts of justice, and comes hither on business, he shall not be prevented from returning by a writ of *ne exeat regnum*. This is the common distinction which I, and my predecessors, have always gone and ought to go by. And, as to the present case, I think it very oppressive to apply for such a writ, after he had brought an action at law, and held the defendant to bail, who would have been liable had he gone off: and, as the suit commenced here is for the same cause, the writ shall be discharged, and let the plaintiff pay the costs.

**ANONYMOUS.**

If a commission issued in term time be made returnable without delay, it is returnable the first day of the next term: if issued in the vacation, the last day of the next term.

A distinction was attempted between commissions in England, and those to go abroad, which were said to be otherwise, but the court gave no opinion as to this; the motion went off on another account.

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**CURRY**

**agt.**

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3d Dec: 4

**ANONYMOUS.**

## Rules

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plaintiff in this case cannot pursue that remedy, he has not that right; for where there is no remedy, there is no right. The only foundation on which they can hope to support their claim here is, that the defendant has received that which the plaintiff demands; but, if he has, that can give him no right to come hither; if he received it for the plaintiff, he may recover it at law; if he received it in his own wrong, he is answerable for it to the tenant who paid it him; and the tenant's having paid his rent to a person who had no right to receive it, does not exempt him from paying it to the plaintiff, if he has the right; whatever right, then, the plaintiff has, it is plain, he has mistaken his remedy.

But clearly his case is not within the view of the statute, for that is expressly confined to tenant for life only. Tenant in tail, say they, is tenant for life to some purposes; so, indeed, is tenant in fee-simple: he has, to be sure, an estate for life, but then he has more, and is not a tenant for life only. But, say they, it is within the mischief of the act: we say it is not. A tenant for life cannot make a lease but what must determine on his death; and, therefore, till this act, it was not in his power to remedy the inconvenience which this act was designed to hinder: but tenant in tail may remove the inconvenience himself; he may make a lease, observing proper requisites, which shall bind his issue in tail; nay, he can go further, he can suffer a recovery, and make a lease for what term he pleases: why, then, should it be supposed, that the legislature intended to remove an inconvenience which the party might have removed himself, and which would not have happened but through his own negligence? The most reasonable construction is, that the legislature intended to remove such inconveniences only as the parties could not remove themselves; and, if the tenant has paid

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and that only, he could have recovered from them by action for the special occupation; the defendant, with respect to the rent, is to be considered here as the tenant, and, if the tenant would be liable to our demand, the defendant must be so. It is impossible for the legislature to provide against, or foresee, every particular case; but the rule of construction is, to consider all cases as within an act, which are within the same mischief, and which, had they mentioned, it is probable, the legislature would have provided the same remedy for. Leases for years determinable, &c. are admitted to be within this act, because within the mischief, though not within the letter of it.

It is insisted, that to be within this act, the lessor must have such an interest as would not enable him to make a lease for any longer term than for his own life; and, therefore, as tenant in tail, under the statute of H. 8., can make a longer lease, he is not within the mischief. Were this rule admitted, it would make nothing for them here; for against remainder-men, which is the present case, the statute does not enable tenant in tail to make a lease for longer duration than his own life: but, I submit, the rule will not hold; for even with respect to the issue in tail, the lease of tenant in tail, unless the requisites prescribed by that statute are adhered to, will determine by his death; and then either the rent must be entirely lost, for clearly neither issue in tail, nor remainder-man, can be entitled to it, or the tenant will, under this act, be answerable to the representatives of his lessor for the use of what he has enjoyed.

*Lord CHANCELLOR.*

Though this is a new case, and no precedent has been cited, I am of opinion, the plaintiff's equity is so strong, that I shall make a precedent. His equity is



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agt.  
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mitted he might commit considerable waste. If this was done  
therein the case of *Guthrie v. Hyatt* *Guthrie* said I thought  
it right; and, whatever the judges at common law might  
do, I should, without scruple, consider him as tenant for  
life in this case.

I do not know, what judges at law might say as to tenant  
for years determinable, &c. for they have determined;  
that a lease for *ninety-nine years, determinable on three  
lives*, is not within the power of leasing: for three lives;  
given to tenants in tail by statute 32 H. 8. c. 28; though  
such a lease for years determinable is so extensive in  
point of duration, and not so beneficial to the lessor as a  
lease for lives; and, therefore, for the same reasons they  
might think so in this case; but, in this court, I should  
have no doubt about determining him to be within the  
act. Then as to tenant in tail, at the instant of the  
death he has but an estate for life, for his estate deter-  
mines on his death. Where a woman takes an estate tail  
*ex provisione viri*, I think that a case within this statute;  
though I doubt it would not be maintainable at common  
law. *Æquitas sequitur legem*, and, therefore, wherever  
this court finds the rules of law right, it will follow them,  
but then it will likewise go beyond them; one case of  
that kind occurred to me during the argument: the  
statutes of forcible entry only provide for removing the  
force, but what says this court? even where a man has not  
a legal but only an equitable estate, or be it one or the  
other, we will here not only remove the force, but grant  
an injunction, to quiet him in the possession of such estates  
as he had then, and three years before.

I will not, however, absolutely determine the first point;  
though I incline strongly in favour of the plaintiff on that.

\* 1 Ves. 524. *Dick. R. S. C. and Fearn.*

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agt.

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then it is not due during the term. This is a nice distinction, but it is agreeable to Lord *Hobart's* expression, who says, judges ought to be astute, to do justice; such, I think, is the present case; and, therefore, I decree the defendant to pay the plaintiff his share of this money, and let the master settle the proportion. No costs to this time: refer the consideration of subsequent costs.

MOULD agt. WYAT, *et c.* cont.

A modus for agistment tithe, endeavoured to be set up in satisfaction of all tithes, and in years when the grass land was otherwise cultivated, held ill.

ORIGINAL bill to establish a modus in lieu of tithes; cross bill to compel the payment of those tithes.

The parish was divided into uplands, and lowlands; the former was arable, the latter was pasture lands, and commonly produced grass only. The modus insisted on was 4*d.* per acre for those grass grounds (with a restriction confining this payment to such parts of them as produced grass only); and this modus was endeavoured to be established in lieu of all *small* tithes for all the lands in that parish, as well uplands as lowlands; and that, too, even in those years when the grass grounds being cultivated, and sown with grain, &c. were not liable to the modus.

Mr. *Wilbraham* argued, that this modus was ill on several accounts; and cited *March*, 79, and 1 *Mod.* 229. Modus held ill, because it is in the power of either party to deprive the other of the effect of it, as the tenant may do here, by ploughing and cultivating the grass grounds. *Ro. Abr.* 651, that one tithe shall not be paid for another,

1733.

MOULB.

agt.

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where there is a modus for one particular tithing, or setting up a *non decimando* against all the rest.

For these reasons, I think it bad in law, but, were the law otherwise, it would fail here in point of fact; for, as to the non-payment of small tithes, it is a common thing for parsons to neglect demanding small tithes of tithes, where his parishioners are bountiful in their *Easter* offerings. Here is no evidence, that this 4d. was ever received in satisfaction of any other tithe than agistment tithe, which is the fittest sort of tithe for a modus, and such I take this to be.

The original bill must, therefore, be dismissed with costs, and payment must be decreed on the other.

LETHIEULIER agt. TRACY, et Ur.

*On Exceptions to the Master's Report.*

A. devises his estate to his daughter in strict settlement, and, if she should die without issue living at her death, limitations over, &c. held, that the contingency related merely to the trust estate during the minority of Sir H. N., and that the remainders were all vested. See vol. 1st, p. 56.

Sir William Dodwell, by his will, devises his lands to his daughter (the defendant, Mrs. Tracy), for life, remainder to trustees to preserve remainders; remainder to her first and other sons in tail male; remainder to her daughters in tail general; and directs his trustees to lay out his personal estate in the purchase of lands to be conveyed to the same uses; and then follows this clause:

"And in case my said daughter shall depart this life without issue of her body living at her decease, he de-

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injoining the several devisees to take his name, and accompanying his limitations with trustees to preserve, &c. to prevent their being barred, plainly shewed his strong desire of establishing the disposition he had made, and securing his estate to the several objects of his bounty in the succession he had directed: that an intention so strongly expressed ought to be favoured, and supported in this court, and ought not to be defeated by the words *living at her death*, which, if understood in the sense they seemed to import, to render the subsequent limitations contingent, would probably destroy that settlement which the testator was so anxious to establish; that these words, therefore, ought to be wholly rejected, as repugnant to the testator's intention manifested in the whole frame of his will, or, at least, ought to be restrained to the limitation next succeeding them (that is to Sir H. N.), leaving the remainder to the plaintiff an independent estate. That the intention ought, in all events, to be effectual; and words had frequently been transposed, added, or rejected, as the case required, to correspond with that intention. To this purpose, Mr. Nod cited several cases. *Napper v. Saunders*, Hutt. 118. *Lakeford v. Clark*, 3 Loe. 125. or *Brown v. Cutter*, by which name it is better reported in Sir Thomas Raym. 427. *Jones v. Westcombe*, . . . . . *Stillingfleet v. Ellison*, 1787, . . . . . *Curton v. Hall*, &c. 11. 5. 1.

That the limitation to the plaintiff, though introduced by an *and*, (which may seem to couple it with what went before), is not therefore dependent on the contingency, supposing the preceding limitation to be so; and for this cited *Hapsford v. Ackland*, 1 Salt. 139; that it is a usual word in a will to introduce new matter; and; therefore, to have no influence by connecting the sentences.

That, under the enlarging the power of a device, in strict settlement, this court has always, if possible, circumscribed it. *Papillon v. Foies*, 4 P. Wms. 471; and *John Hall v. John Hall*, 10 P. Wms. 247.

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The testator most certainly intended, that the limitations over should take effect, notwithstanding this clause, which seems to be contrary to that intention. This is a trust executory, if there be any such thing, and, therefore, is to be executed according to the intention of the person making it. Can it be said to be executed according to his intention, if we do it in such a manner as will make the subsequent limitations depend on such contingencies as the testator could not foresee, and liable to be destroyed by the birth of a child of his daughter, though that child should not survive its mother a week? In the case of *Foy v. Hind*, Cro. Car. 696, and *Sir Wm. Jones*, 56, though the devise was executory, they held the remainders vested remainders, for that it must be the testator's intention to have all the remainders take place successively. This case is cited with approbation in the case that has been mentioned of *Luxford v. Clarke*, as it is reported by the name of *Brown v. Cutter*, by Sir *Thos. Raymond*, 127. In the case of *Cowper v. Cowper*, 2 P. Wms. 675, Sir *Jos. Jekyll* declares, he shall always contend for the intention where it is plain, &c.

To be sure a man may put in an arbitrary condition if he pleases, but there could be no view in doing it here. In the case of *Green v. Armistead*, *Hob.* 68; it was held, that such a loose word as *elsewhere* should not destroy the effect of the rest of the will. In the case of the *Countess of Bridgewater v. Duke of Bolton*, my Lord C. J. *Holt* said, it was no new matter to throw out loose

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words from a will, rather than permit the intention of the testator to be defeated. All these were cases of construction of wills already executed, but, in the present case, your lordship is about to direct a conveyance where the words may have a different construction from what your lordship would give them. Will it be contended then, that loose words, thrown in here without any view to benefit his daughter, or family, or for any other reason that I can see, should be suffered to defeat the whole subsequent limitations, or make them determinable on such a contingency, especially as, besides his daughter and Sir H. N., it does not appear, that he had any relations to whom he could intend the estate should descend on her death, if this contingency should not happen? In *Tollett v. Tollett*, your lordship thought, as it was an executory trust, you had a power to give it a greater latitude of construction; if your lordship will give this such a construction, I am sure you will reject those words which seem to tend to destroy the whole effect of the will. In the case of *Spalding v. Spalding*, Cro. Car., at law, and *Kentish v. New*, in this court, words were supplied. In *Hare v. Barton*, cited in Cro. Eliz. 345, the reservation was before the *habendum*; it being by indenture, it was held well enough, for the law shall marshal them according to the intent. In *Scattergood v. Edge*, Lord C. J. Treby calls such a limitation not a preceding contingency, but a preceding estate. *Sparks v. Fairman*, Hob. 75. *Dyer*, 127, last edition, anonymous case in the margin. *Forth v. Chapman*, 1 P. Williams, 663, the same words applied to real and personal estates shall have different constructions. In *Sheffield v. Lord Orrery*, your lordship construed the note at the bottom of the report of *Forth v. Chapman*, 1 Sid. 102. 1 Keb. 248.

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granted, before it can be done. The cases cited have nothing to do with this question, for they go on different principles. In *Napper v. Saunders*, there is nothing but a regular succession limited, not dependent on any contingency; for the word *if* will not make a contingency, it is the same as if he had said *after*: so are all the rest.

Lord CHANCELLOR.

What say you to *Luxford v. Clarke*? In all these cases the testator's intention appears plainly to be, that the remainder-men should take on the determination of the precedent estates:—

*Jones v. Plunkett*, 1 Lev. 11.

2 Ro. Rep. 197. 217.

Cro. Car. 590.

After two days, the *Chancellor* delivered his opinion.

Lord CHANCELLOR.

It is objected, that the contingency on which the estate of Sir *H. N.* was to have been dependent not happening, the subsequent limitations cannot take place; but I am of opinion, those limitations do not depend on that contingency.

The words “and for default of such issue,” mean not only the issue of Sir *H. N.*, but of all the issue to whom the estate was descendible by the preceding limitations. The contingency, according to the grammatical construction, might be extended to all the subsequent limitations; but, where the intention of the testator does not appear to warrant that construction, it ought not to be so construed: and I really think, the contingency here

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hold, it was apprehended, could not go over, unless the Duchess happened to marry again: it was very difficult to ascertain what part was freehold, and what not; and, therefore, I took it by admission, that part of the site was freehold, and part leasehold; and I thought, notwithstanding the Duchess did not marry again, the limitation over of the leasehold was a good limitation to Mr. *Sheffield*: as to the freehold, I was of opinion, there were other words, in the latter part of the will, which carried over that with the residue of his estate, and, therefore, that limitation did not depend on the first clause; but this arose on a will so particularly penned, that it cannot be made a precedent in any other case. I am therefore of opinion, that these limitations are all vested remainders, to take place on the failure of issue of the precedent devisees; and Sir *H. N.* being dead without issue, that contingency is out of the case. The personal estate therefore must be settled to the lady for life; remainder to trustees, &c. in strict settlement; remainder to Mr. *Lethieulier* in the same manner: and, I think, the cases I have mentioned, of *Napper v. Saunders*, and *Luxford v. Clarke*; warrant this construction.

Here arises a question, whether there should not be a limitation to the issue female of the sons of Mrs. *Tracy*, on failure of their issue male, prior to the limitation to the plaintiff; since the limitation to the plaintiff is held a vested remainder on account of those words, "and for want of such issue," which imply, that, his estate was not to come into possession, while there remained any issue of the precedent devisees.

Mr. *Noel* contended, that the words were meant to relate to *such* issue only to whom the estate was previously limited. But Mr. *Solicitor*, for the defendant, insisted,



that nothing was clearer, than that it was the testator's intention, neither Sir *H.*, nor the plaintiff, nor any other person, were to take any thing, while there remained any issue of the testator. Mr. *Noel* replied, that the letting in the issue general, in the manner now contended for, would give the defendant a right to bar the subsequent limitations; which would be contrary to his lordship's present determination.

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But his lordship said it would not, for that the question in this case had hitherto been only, whether or no the remainders were contingent; and his determination, that they were vested, did not prevent their being barred by any person who had a right to bar them.

So he directed the cause to stand over, to consider of this point.

### MALLOCK agt. SALTER.

MR. *Attorney General*, for the plaintiff.

*Rawlin Mallock* being seised in fee of the rectory and sheaf of *Collompton*, and likewise seised of the advowson of the vicarage (as we say) in gross, mortgaged the same, in 16 , to Mr. *Pollexfen*, who, in *Feb.*, 2 *Jac.* 2. assigned this mortgage to Sir *Wm. Courtenay*, in trust for Sir *Edward Seymour*.

The plaintiff claims the advowson of a vicarage, as mortgagor; insisting, that it was inserted fraudulently in a particular of a trust-estate, di-

12 *Jan.* 1688, *R. Mallock*, the mortgagor, made his

directed by decree to be sold for payment of debts; held, that the equity of redemption of an advowson lapses, and the plea allowed without prejudice, &c.

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will, and thereby limited his estates to his son, with several subsequent limitations (all since spent); remainder to the plaintiff's grandfather for 99 years, if he should so long live; remainder, in like manner, to the plaintiff's father; remainder to his eldest son (the present plaintiff) in tail. In 1697, *R. M.*, the son of the testator, executed a trust-deed (*inter alia*) of the rectory, with its appurtenances (not naming the vicarage), which the trustees were to sell to pay debts. In , a bill was brought, by certain purchasers under this trust, against *R. M.*, the son, in order to have their purchases secured against the above mortgage, &c. In 1710, that cause came to a hearing, and it was then decreed (*inter alia*), that, in order to make satisfaction for the debts which had not been paid, the trust-estate, (*i. e.*) the estate included in the trust-deed, should be sold, for that purpose. *Sellack* (afterwards the purchaser, under whom the defendant claims) being then solicitor for the plaintiffs, contrived to insert the advowson of the vicarage in the particular carried in before the master, and then bid for it himself. The master, and the parties, happened to overlook this fraud, and the solicitor was reported the best purchaser, and the estate was accordingly conveyed to him in 1717, in which the assignees of the mortgage joined; but the plaintiff was no party either to the cause or to the conveyance, though the remainder in tail was limited to him by the will. In 1749 the plaintiff's title accrued by the death of his father, and we have now brought this bill, the church becoming vacant, to have our clerk admitted, and to be relieved against this gross fraud. To this bill the defendant has pleaded *Sellack's* being a purchaser for a valuable consideration, and two presentations made by them on former vacancies. To these presentations we are strangers; the plaintiff was then an infant, and his title is but lately accrued, and we could not have come sooner; and, as to *Sellack's* purchase for a valuable consideration,

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Mr. *Solicitor General*, and Mr. *Wilbraham*, argued for the defendant, that the vicarage was included in the deed of trust (and, consequently, in the decree) as appurtenant to the rectory: that vicarages were originally parts of rectories, and derived from them; and, therefore, *prima facie*, the rector is entitled to the vicarage: that were it not so, the defendant, by the purchase, had undoubtedly the legal estate; and till that purchase was set aside (which is not the end of this bill), the court cannot say their clerk shall be admitted. But supposing the defendant to stand only in the place of the mortgagee; if a mortgagee has been in possession twenty years, unless attended with particular circumstances, the mortgagor shall not be permitted to redeem. This mortgage was in 16 ; we have been in possession ever since 1717, and the plaintiff neither does, nor can, desire to redeem, nor have any of the prior tenants in tail (of an equity only) ever attempted to redeem; how then can this be considered as a redeemable interest? If we are, as we ought, considered as purchasers, there is an end of the question: if as mortgagee only, as the plaintiff would have us, we hope our mortgage was irredeemable.

Lord CHANCELLOR.

This is a very stale demand: after a purchase in 1717, after two presentations made by the purchaser, and now, on another vacancy, is this set up. The only doubt I have had in this case is, whether I should allow the plea, or direct it to stand for an answer: should I direct it to stand for an answer, it will make it liable to exceptions, and therefore I will allow the plea.

The only question is, whether this advowson is included in the deed of trust or not? The rectory, and every thing appurtenant to it, is admitted to be included: the ad-

LAKE *agst.* COOK.

Legacies bequeathed by the will of a husband, and subsequently of his widow, proving void, they fall into the residue of the estate, and are not to be distributed among the remaining legatees.

A WOMAN, by her will, gave £700 to the legatees named in the will of her late husband (without naming them), to be divided among them according to their legacies from her husband; and charged an estate in the hands of her devisee with the payment of it.

One of the husband's legacies was supposed to be void in point of law, and some others of the legatees (though there were several peremptory advertisements directing them to come in and support their claims under a decree of this court, and inquiries directed about them), did not come in, nor could be heard of. The master reports this specially to the court, and submits what is to be done with respect to their shares. The words of the nonclaimed legacy in the husband's will, were, "To such of the children of Dr. Fuller, who lived at the Lion in Cornhill, as were then living." The legacy supposed to be void was, "To such nonjuring clergy as Dr. Fuller should nominate," who made no nomination.

The *Attorney General*, for the legatees, argued, that the legacy to the nonjuring clergy was void; and as to the other, no children of Dr. Fuller coming in, or being heard of, *non constat*, that there were any then alive, and it ought to be presumed there were not; and then, he insisted, the whole ought to be distributed among the rest.

Lord Chancellor. The meaning of the words, that, not coming in, they should be excluded

the benefit of the decree, is only to indemnify executors, &c., on distributing assets among creditors, and legatees, against subsequent claimants, and will not entitle any other person to a legacy not claimed.

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Mr. *Clarke, & cont.* for the devisee, urged, that had the wife taken the trouble to apportion her legacy of £700 among her husband's legatees by name, it would have been clear that a nonclaim, or lapse of any of the legacies, would not entitle the other legatees to it; and her will ought, in the present case, to receive the same construction, since she evidently intended such a distribution, and only expressed herself more briefly, by referring to her husband's will, to save herself trouble. That this legacy of the wife was not a joint bequest, but followed the nature of the legacies given by the husband's will, to which the several legatees were entitled as tenants in common; and no one of the legatees could by any means become entitled to the legacies of the others. And that the share unclaimed ought to remain a charge on the estate for the benefit of the nonclaiming legatees, if they ever should claim; and if not, it should sink into the estate.

*Lord* CHANCELLOR.

Two questions have been made as to what shall become of the unclaimed legacies: 1st, on the will of the husband, and, 2dly, on that of the wife, which is the material one.

The legacy given to the children of Dr. *Fuller* I must consider as a void legacy on the evidence before me. That to the nonjuring clergy, I think, is void in point of law, for it is given to them under a description as criminal

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persons: it is the same as if it was given to popish clergy; for they are liable to be summoned before the quarter-sessions to take the oaths, and, if they refuse, they become popish recusants convict: but to make it void here, it is sufficient, that it is given to such as Dr. *Fuller* should nominate, who has made no nomination; but, were that out of the case, I think in law it would be so for the reason I mentioned. *Vid.* 1 *Vern.* 248.

Then as to the clause in the wife's will, I think the construction must be the same as if she had enumerated the several persons named in her husband's will by name, which amounts to the same as if she had repeated his words, which, it is probable, she only avoided doing to save trouble: and, had she done so, none of those legatees could claim any benefit of other legacies lapsed, or unclaimed. The legacies void for want of objects, or void in law, are *quasi non scripta* in the will; if they are so in the husband's will, so likewise are they in his wife's; and then on this construction, which I have no doubt is the just one, the plaintiffs can have no benefit of these legacies: they are in the nature of tenants in common, and no survivorship between them. If it be void, or lapsed, though it be a proportion, it shall not go to the survivor, but to the residuary legatee; and it has been determined, that a devise of a *residuum* to several, one of whom dies before the testator, shall not survive, but lapse. *Owen v. Owen*\*.

And, therefore, I declare, on the Master's report, that none of the plaintiffs are entitled; but if any other person who is entitled does claim, it must be paid.

\* 1 *Atk.* 494.

*Hilary Vacation, 1754.*

WALKER *agt.* FLAMSTEAD.

*W. B. ALLESTRY*, by his will, after giving some legacies, devised to *E. Grevious* all his real and personal estate, subject to the payment of his said legacies, and likewise to the payment of his just debts.

A purchaser of an estate devised subject to the payment of the testator's debts and legacies, in general, need not look to the discharge of them; and of a bill brought against a devisee for payment of a debt generally out of an estate, a purchaser is not bound to take notice.

In the year 1741 one of the creditors brought this bill against the devisee, who, *pendente lite*, just before the decree, applied to — *Baker*, and borrowed of him £1000, and for repayment of it, mortgaged the estate devised to her by this will. Soon after, the cause was heard, and a sale directed; and upon notice of the mortgagee's claim, a supplemental bill was filed against him, charging him with notice of this suit, which, by his answer, he positively denied; but he admitted notice of the will, which, indeed, he must have had, as *Mrs. Grevious* had no title but under the will, not being the testator's heir at law.

Upon this case two questions were made: 1. Whether the mortgagee (having notice of the will, and consequently knowing that the estate mortgaged to him was thereby devised subject to the payment of debts and legacies) ought not to be postponed till those debts and legacies were satisfied: or (if, as the debts were not disclosed, it should not be thought necessary for him to see the discharge of them) whether, the legacies being particularly expressed, he

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ought not, at least, to look to the payment of them? And it was strongly contended, that as to the legacies, if not the debts, the estate in the hands of a purchasor would be liable.

2. Whether this cause was not such a *lis pendens* as all people are bound to take notice of at their peril? And to this were cited, 1 Chan. Cases, 151. *Style v. Martin*, where it is held, that all are bound who come in *pendente lite*; and 1 Chan. Cas. 301, where a purchasor paying his money the day the bill was exhibited, lost it, which is the strongest case that can possibly happen.

*Lord* CHANCELLOR.

The rules of this court, in cases of this kind, are pretty certain. Wherever a mortgagee, or purchasor, comes in under a trust created for discharging certain and particular incumbrances, he must see those incumbrances discharged, or be liable to them: but, on the other hand, if an estate is devised in trust for, or, which in this court is the same, subject to the payment of the testator's debts in general, a purchasor, really and fairly paying his money for the thing he purchases, or for the security he takes, to the trustee, or, if of a personal estate, to the executor, is always indemnified; for it is impossible he should know what those debts are.

There is another case, and that is the present, upon which Mr. *Attorney General*, and Mr. *Wilbraham*, have attempted to make this distinction, that where it is subject to debts, and legacies, the latter being certain, though the former are not, it becomes necessary for the purchaser to see the application:—I think otherwise. If an estate is devised, subject to particular legacies and nothing else, a purchasor must see those legacies discharged;



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no dispute about the title, but only a bill for an account, &c. it stops nothing; a purchaser may pay his money to the hands appointed by the will to receive it, and they are to look to the application. This is a general bill for performance of the trust, and payment of a debt. The devisee is liable to so many different suits to other creditors; and were the execution of the trust to stop till all those are determined, the interest would run on, and the whole assets be exhausted before any part of them could be applied. This, too, is a suit instituted by creditors of the lowest sort, voluntary creditors, though as to others, to be sure, that makes no difference. Upon the whole, the rule is, that a general bill brings for an account of a personal estate, or of real and personal, both consisting of various parts, by no means created *in his pendens* as will affect a purchaser from this devisee, but in the case of a bill, charging a particular estate with a particular trust, it is otherwise.

The money arising from the sale must be first applied in discharge of what shall appear due to the mortgagees, which let the Master compute, and tax him his costs.

At Mr. Wilbraham's instance, the Chancellor adopted his directions, that the creditors should stand in the place of the mortgagee as against the mortgagor, and have the benefit of the mortgagor's covenants to charge his estate as a specialty debt.

**MITFORD** *agt. WICKER* (before the MASTER of the Rolls, sitting in the Chancellor's room, he being gone to the House of Lords).

**W. WICKER**, esq. by his will, reciting that he was entitled to £6000, then out at interest in the funds, bequeathed an annuity, and his household goods, &c. to his wife for her life; and then giving some other annuities, and small pecuniary legacies, went on to say, that in case he left a son, he gave the whole of his fortune and substance to that son; or if more sons than one, he directed in what manner and proportions it should be divided between them; and then adds, that, if he left no issue, he gave his whole fortune to be divided between the second son of his brother, *J. Wicker*, the defendant, and the second son of his sister, *S. Mitford*, to be begotten by her present husband, or any future husband; and then he makes a proviso, that in case there should be no such second sons, he gave one moiety of his fortune to the eldest son of his sister, *Mitford*, in case he should be living at the time of his death, and the other half to his brother, the defendant. And after several clauses, in one of which he provides an allowance out of the interest of his fortune for the maintenance of his own children, in case he left any (without making any for the children of his brother and sister, who were to take in case he left none himself), he concludes with a residuary bequest to his brother, the defendant, whom he makes executor.

The testator died, leaving no children of his own: his sister has issue only the plaintiff, who is still living: the defendant, the brother, had none. The defendant taking

Testator, after bequeathing an annuity, and goods to his wife for her life, directs his whole fortune, in default of his own issue, and of a 2d son of his brother, and a 2d son of his sister, to be divided between the plaintiff, and the defendant, making the latter residuary legatee. Held, that, under the words *whole fortune*, the interest of the moiety, till the determination of the contingency, did not belong to the plaintiff; and that the residuary legatee was entitled to that, and the reversionary interest in the goods left to the wife.

1734.

Mifford

vs.

Wickes.

possession of his effects, the plaintiff, an infant, by his next friend, brought this bill, to have the testator's estate secured, and accumulated, &c. and coming now to be heard by his counsel,

Mr. *Solicitor General*, and Mr. *Hoskins*, argued, that, as there was no second son of Mrs. *Mifford*, and the testator had given over one half of his fortune to the plaintiff, in case he should be living at his death, in default of a second son, it seemed to imply an intention in the testator not to let the right remain in contingency during Mrs. *Mifford's* life, but to confine her having a second son to his own lifetime; and if so, the plaintiff was now entitled to one half of the fortune under the proviso: but, if the court should think otherwise, yet as the plaintiff would be entitled, on the event of his mother's having no second son, to that moiety on her death, he had a right to come into this court to have it secured to him, to have it properly laid out in the mean time, in order to accumulate until the contingency should be determined.

To this the *Attorney General*, and Mr. *Clark*, for the defendant, answered, and the court agreed, that neither the plaintiff or defendant could be entitled to the respective moieties of this capital, as long as there was a possibility of the contingency's happening, i. e. of there being such second sons for whom the testator primarily intended his bounty: that he could not intend to confine it to the period of his own death; that, if there ever were any second sons, they would be entitled, and, therefore, the plaintiff could have no claim during his mother's life. However, as he had a possibility of right, that was sufficient to justify this bill, and he was entitled to have the fund secured. So, the question was reduced to this, whether or no the produce of the capital should be ac-

accumulated for the benefit of the persons who might be eventually entitled to the principal, as the plaintiff would have it, or whether the defendant was entitled to that produce, as residuary legatee?

1774.

MITCHELL  
vs.  
WICKHAM.

WICKHAM.

For the plaintiff, it was insisted, that the testator, after giving the annuities, and other small legacies, had given the whole of his estate to his children, if any, if not, to his two nephews, the second sons, &c.; that he had industriously used the words *my whole fortune*, and the like, in every bequest, as well in that under which the second sons, &c. would be entitled, as that intended for the benefit of his own children, if he had left any; that the whole, therefore, being already disposed of, the defendant could take nothing by his residuary bequest: that wherever the whole of any estate, whether real or personal, was devised, that necessarily includes, and carries with it, the rents and profits of the one, and the produce of the other, as well as the capital, or thing expressly devised. That it was no unusual thing to direct legacies, dependent on contingencies, to accumulate: that this residuary bequest was only of a residue upon a residue; for that the words "the whole of my fortune," import the whole residue as much as the others do, and exclude a possibility of any thing remaining undisposed of; and, of course, the defendant could take nothing by the subsequent residuary bequest, for there could not be two residues.

On the other side,

On the other side, it was insisted, for the defendant, that the addition of this residuary bequest was a proof, that the testator thought there was something remained to be disposed of: that there could be nothing remaining undisposed of but the produce of his estate before the contingencies happened on which his bequest of it was to take place, unless it was a sort of reversionary interest

1754:  
 MPPOR  
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in the goods specifically bequeathed to his wife for her life: that the testator seemed to consider the capital of his estate and the interest of it, distinctly, mentioning the former as his fortune, or substance, and taking notice that it was out at interest, or should be placed out: that the testator had expressly directed a maintenance for his own children, if he left any, out of the interest, which seemed to imply it to be his opinion, that, without that direction, the interest must have gone some other way: that, as the direction extended to his own children only, neither the plaintiff, nor the persons who might be entitled to the capital, on future contingencies, would have any claim under it; but that though the testator should be thought to have never intended the interest for the defendant, yet, as it was not otherwise disposed of, it would go to him under the residuary clause. If a man was, by an express clause in his will, to exclude his heir from taking, yet, if he made use of no other disposition, the heir would not be excluded. Devises, or bequests, of estates, whether real or personal, to vest in *futuro* upon certain contingencies, have always been construed not to carry the *mesne* profits; those, instead of accumulating for the benefit of the person entitled to that future, contingent interest, have always been considered as undisposed of, and descended to the heir, or residuary legatee: that residuary legatees are always entitled to lapsed legacies, and this was a kind of temporary lapse; and, until the existence of a person entitled, the defendant, as residuary legatee, must have the profits: that courts of equity have always leaned against accumulations, never encouraged, but rather endured them, as it were, by a compulsion, where the testator's words were so explicit as to admit of no other construction.

The case of *Stephens v. Stephens*, determined in the

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breaking in upon any rule of law; accordingly the profits were, in that case, decreed to accumulate. Agreeable to this was the case of *Green v. Ekins*, before *Ld. Hardwicke*, 6 Dec. 1742 (3 P. Wms. 306), where a personal estate not being to vest till a future contingency (being devised to such son of his daughter as should first attain the age of twenty-one, with limitations over, if she had no son who should attain that age: the daughter had a son, the infant plaintiff), his lordship directed the interest and produce, in the mean time, to accumulate, and go to the person who should eventually be entitled to the capital.

"That it would be absurd to suppose, that the testator intended, that, had he left children, the surplus of the produce of his estate, after deducting the maintenance directed to be allowed them during their minority, should go to his brother; and, if the surplus, in that case, would not have gone to him, no part of the produce can go to him in this case; but the whole, in the present situation of the family, as the surplus would have done in the event of his leaving children, must wait till the persons entitled attain a proper age to receive it: that no words could be more expressive of the testator's intention to have it accumulate, unless he had directed it in terms, than a bequest of his whole fortune and substance: that if his whole fortune and substance were disposed of, surely nothing would remain undisposed of to pass by the residuary clause: that as to the goods specifically bequeathed to the wife for life, neither would the defendant be entitled to those after her death, as the gentlemen on the other side seemed to take for granted, but those likewise would go to whomsoever should be eventually entitled, under the bequest of his whole fortune: that where there is an absolute bequest of the whole, and a temporary interest in part after bequeathed, that takes it out of the

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in these goods, likewise belonged to the defendant; the  
 to her estate, and she was to have the residue of her  
 residuary legatee.  
 Accordingly, it was decreed, that the money should be  
 placed out on proper securities, and the surplus of the  
 interest, after payment of the annuities, &c. should be  
 paid to the defendant, until persons should come in who  
 who would be entitled, as second sons, under the testator's  
 will, or until the event should happen, which would de-  
 termine the possibility of there being such second sons;  
 in which case the plaintiff would be entitled to a moiety.

Costs given on all sides, with liberty to apply, &c.

### CHURCHILL agt. DIBBEN.

*A feme covert*, in pur-  
 suance of a  
 power re-  
 served to her  
 in the mar-  
 riage settle-  
 ment, devises  
 different  
 parts of the  
 settled  
 estate, and  
 also lands

By a settlement in 1685, on the marriage of *Thomas Diben*, esq. and *Elizabeth* his wife, the said *Elizabeth* con-  
 veyes several lands and tenements to the use of herself for  
 life, and so on, in strict settlement, to the issue of the mar-  
 riage; and, in default of such issue, as to part, to the use of  
 the husband, as to other part (including a moiety of *Map-  
 percombe* farm, and likewise a tenement called *Buccombe*  
 farm, and several other lands), to the trustees, and their  
 heirs, who were to stand seised thereof in trust, for, and

after purchased by her with the produce of it, to several persons;  
 and gives all the rest of her property to her residuary legatee, and  
 executor. Held, 1st, that, by the residuary clause, both real, and  
 personal estate passed as by appointment; 2dly, that a bequest of a  
 moiety of *M. farm*, followed by one of other lands, &c., to the same  
 person, his executors, &c. for ever, carried a fee. 3dly, that free-  
 hold-lands contracted for, or purchased by, a *feme covert*, cannot be  
 disposed of by her will; but that leasehold-estates may pass. 4thly,  
 that a sum to which she might have appointed, fell to her executor,  
 and not to her surviving husband.

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"executors, administrators, and assigns, for ever. Item, I  
"give to my husband, *Thomas Dibben*, my *Buccombe*  
"and the estate I purchased of *Wm. Saunders* at *Nettle-*  
"combe, during his natural life; and, after his decease, I  
"do give and bequeath those my lands at *Buccombe*,  
"and that which I purchased of *Wm. Saunders*, unto  
"my kinsman, *Thomas Churchill*, to him, his heirs, and  
"assigns, for ever. Item, I give and bequeath unto  
"Thomas Regler, my coachman, £5; and all the rest of  
"my goods, chattels, estates, and estate, whatsoever, and  
"disposed of, I do give and bequeath unto my kinsman,  
"Richard Churchill, the younger, to him, his heirs,  
"executors, and assigns, for ever. Also I do nominate,  
"and appoint, him my executor to this my last will, where-  
"unto I have set my hand, and seal. *Elizabeth Dibben*  
"Signed, sealed, and delivered, in the presence  
"of us, and at the request of the testatrix,  
"James Burt, Wm. Buckler, Esqrs."

To ascertain the rights of the several parties, this bill was filed by *Richard Churchill*, and *Mary* his wife, the heir at law of the testatrix, against *Thomas Dibben*, the husband, *Thomas Churchill*, and *Richard Churchill*, junr. the devisees, &c.; and now, at the hearing, the several questions following arose, viz.:

1. Whether the testatrix, under the power before stated, had an authority to dispose of the after-purchased lands, either freehold or leasehold: and whether her purchase from *Saunders*, not being completed, but resting in contract, varied the case materially?

2d. Whether this will be good, as an execution of the power?



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wife should be at liberty to dispose of her personal estate, will enable her so to do, (and the *Solicitor General* said; where a woman has a separate estate, the spiritual court will grant probate to her will, though there be no such agreement): but no agreement between husband and wife, giving her leave to dispose by will, &c. of a real estate, will be of any effect, because it is a third person in this case, the heir at law of the woman, that would be defeated by it, which he cannot be by such a will, unless the lands were conveyed to trustees, reserving to the *feme covert* a power of appointing uses, in which case it would be good; for the appointment takes its force from the conveyance. Separate personal estate of the wife, therefore, though by agreement she had power to dispose of it, if she lays it out in lands, and those lands are accordingly conveyed to her use, those lands cannot be disposed of by a will during her coverture.

So the question came to be, on this part of the case, how far, if, after a contract for a purchase, the wife dies before it be carried into execution, that will make a difference?

And, upon this question, it was contended, by Mr. *Attorney General*, and Mr. *Wilbraham*, that this purchase resting in contract, the vendor was to be considered as owner in point of law; and then the interest of the testatrix, being only equitable, was subject to her disposition by an equitable appointment: that such trust estates ought to be subject to her appointment, as much as the money would have been wherewith they were purchased; for, had she only taken a mortgage, she would clearly have had a right to dispose of that by appointment, and it would be very hard to prevent her, merely because she had foreclosed the equity of redemption.

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See of these lands, there would have been no doubt, but that all of them, together with the whole interest therein not before disposed of, would have passed by the residuary devise of "All her goods, chattels, ~~effects~~, and ~~estate whatsoever~~, undisposed of, unto R. C., his heirs, executors, and assigns, for ever." For that the word estate was, as Lord Holt calls it, in the case of the Countess of Bridgewater, and the Duke of Bolton (1 Salk 287.), *genus generalissimum*, includes all things real and personal, and passes all the interest of the deviser: that though this word may be so coupled with personal things as to be confined in sense to personal estate, according to the case of *Wilkinson v. Merryland*, Eq. Ca. Ab. 118. Cra. Car. 447. 1 Ro. Abr. 824. 1 Jones, 880; (where a testor devises all the residue of his goods, leases, mortgages, estates, debts, ready money, and other goods, whereof he was possessed, to his wife, the word estate there, being coupled with so many species of personal estate, was held to be confined to the same sort of property; and the rather, as the sense of it was further restrained by the word *possessed*;) in the present case, it would admit of no such construction, the words of this clause being properly adapted, part to the residue of her personal estate, and the others to the residue of her real estate, and the respective limitations annexed to the devise, shew, that she meant to include both; for as the words "whereof he was possessed," in the above case, following the words *estate*, &c. and making part of the description of the thing intended to be devised, were held to retain its sense; by parity of reason, the word *heirs*, in the case now before the court, enlarges the limitation. *Taylor v. Webb*, *Style*, 301. 319; that, as a devise of all the real and residue, of my estate, chattels, real, and personal, in a will wherein pecuniary legacies were before given, had been held not to pass lands, for that the words, *real and residue*, of his estate, are relative, and must be intended

estate of the same nature with that he had before devised; and having before given no real estate, there could be no real and residue of that out of which he had given nothing; *Marlow v. Tinsden*, Bq. Ca. Ab. 211; so, for the same reason, in the present case, several parts of the testatrix's real estates, as well as of her personal estate, being before given, the relative words "test of her goods, chattels, real estates and estate," must refer to those precedent dispositions, and include what remained of both; and the word *estate*, coupled with the very words which it accompanies here, "goods and chattels," has had the construction now contended for, in the case of *Timms v. Page*, B. Chan. Ca. 262, which was a devise of divers legacies in money, and then followed a devise of lands, "all the first and residue of his money, goods, and chattels, and other estate whatsoever, he gives to J. S." Having other lands, it was decreed, by Lord Nottingham, that those other lands passed.

But that is not the case here. The testatrix, being a widow, had no power to make a will, or to dispose of her real estate, or to make a devise, upon the whole, therefore, if this had been the will of an unmarried woman, it would have carried every sort of property of which she was seized, or possessed. But as this was a devise which she had no right to make but under a particular power, that there seemed at first some force in that distinction. That this, however, was not the case of a person having a power to make an appointment in the lands of another; the lands here were absolutely hers, and her only incapacity of disposing of them in the ordinary way, was her coverture. That, as a *feme covert*, to be sure, she could dispose of nothing, but under this power; the consequence of which is, that in the act of making this will, she could have nothing in view but the execution of the power: that makes the case very different from what it would have been, could the devise have been meant of any other estates than

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those included in this power: it certainly was not meant to give him the after purchased lands; not, because she had no power to give them, but, it is plain, she had no intention of doing so, because she had before given them to *Thomas Churchill*, and, therefore, the disposal of these lands is all she could have in view.

If a man having lands of his own private property, as well as a power of appointing in other lands, made such a devise, the private property would satisfy it, and there would be great colour of reason in saying, that that was all that was meant; but in the present case, unless these lands were meant to pass, the whole devise is nugatory, for she had no other.

That this will, considered as an execution of the power, had followed it pretty accurately; for, as in the settlement, when she had disposed of part of her estates, she adds a sweeping clause which includes in this power all the estates of which no use was before limited; so in the will, after giving a particular estate to *G. C.*, she gives to *Richd. Churchill* all the rest of her estates, and estate, whatsoever, undisposed of. Suppose she had in her lifetime conveyed these estates by deed, one to *Thomas Churchill*, and all other her estates, and estate, whatsoever, to *Richard*, in fee, would not that, as she was a *feme covert*, and had no other estates to dispose of, be a good execution of the power?

The court will allow a greater latitude of construction in support of an instrument affecting a man's own estate, than of an instrument purporting the execution of a power in the estate of a third person; as in *Orby* and *Lady Mohun*, 2 *Vern.* 531. 543., where a man having power, to make leases reserving the ancient rents, &c. without specifying what those rents were, *Lord Cowper*, and

*Trust, contra. Heir*, held it void for uncertainty, and the inconvenience the remainder-man would be put to, in not being able to show with exactness, &c.; and that though a court of equity may decree such a lease good between the lessor and lessee, yet there being no consideration in the case, it was not proper the court should interpose in supplying the defect, and thereby lay a charge on the right of a third person.

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*Re contra.* On behalf of the heir at law, it was contended, that the word *estate*, in company with other words descriptive of particular sorts of personal property, had been often held not to carry lands; that the testatrix using the word *heirs* in the limitation of this residuary devise, was no proof of her meaning any thing inheritable, for in the limitation to *Thomas Churchill*, where she undoubtedly meant a fee, she had used the words "executors and administrators," which would not have carried a fee, but for the subsequent words "for ever:" this shews she was not a competent judge of the propriety of her words. That, if this clause should be thought comprehensive enough to take in real as well as personal estate, as it was penned in such general terms, and without any kind of reference to the power, there was no reason to suppose it intended to extend to the lands included in the power, as it appeared, the testatrix had other lands which she plainly thought she had a right to dispose of by her will; and lest the whole of those other lands should not be comprehended in the preceding part of her will, she might add this general clause, or make it more general, in order to substitute *R. C., junr.* in the place of her heir at law, as to what, if any thing, should remain undisposed of.

That the residuary clause might be satisfied by this  
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supposition, if not by the personal estate alone: that as long ago as Sir *Edwd. Clere's* case, there had been thought to be a great difference between the cases where a man is disposing of lands of his own property, and where it is to operate as an execution of a power, that it shall never be considered as an execution of a power, unless where it can operate no other way, and must otherwise be totally nugatory. That no authority had been cited, to support the distinction attempted between an execution of a power by a married woman, and by a person at large; and, therefore, the court would construe them both alike. It is contended, that this will is properly adapted to the power, and yet they would have it take in all her real and personal estate whatsoever, though clearly she had no right, under the power, to make such a general disposition. The personal estate may pass in such general terms; but as to the real, there is no such violent implication, or, as it may more properly be called, very strong probability of intention to comprehend any, much less that included in the power; that the court must necessarily give it that construction; and, if there be no preponderance, the turn of the scale belongs to the heir at law, and he is not to be disinherited, where it is so dubious, that she might be supposed either to mean, or not to mean, to disinherit him.

4thly. What interest had *Thomas Churchill* in the moiety of *Mappercombe* farm?

And on this question it was contended, by Mr. *Henley*, that the words, "Item, I give and bequeath unto my kinsman, *Thomas Churchill*, all the moiety of *Mappercombe* farm now in my possession," was a complete sentence, and had no more to do with the words which followed, than with those which went before it. If so, for

want of words of limitation, he had only an estate for life, and the remainder expectant on his death, passed under the general devise to the residuary devisee; and for this he cited *Rooke v. Rooke*, 2 Vern. 461, where a man devises *Blackacre* to *A.* for life, and *all his lands not before devised* to *B.*: by this the reversion of *Blackacre* was held well devised to *B.*

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(*Thomas Churchill*, the devisee, had, by his answer, disclaimed any right to this farm).

*E con'*. It was insisted, by Mr. *Solicitor General*, that the sentence must be carried on, and include the following words, importing a devise to the same person of other lands, and must be read thus: "I give to my kinsman, *T. C.*, the moiety of *M.* farm; and likewise "give him," (lands of another denomination), "to him, "his executors, administrators, and assigns, for ever." That the whole made but one complete sentence, and the words of limitation related, and must be carried back, as well to the lands included in the first description as the last, which would give him an estate in fee. And as to his disclaimer, it being only on the foundation of the testatrix's having no right to devise, it cannot bind him against the residuary legatee.

5th. Whether the after-purchased leasehold estates were included in the devise to *Thomas Churchill*, of all the lands which she had purchased, except that which she bought of *Wm. Saunders*?

For *Thomas Churchill*, it was insisted, that the devise of all the lands which she had purchased, without confining it to freehold or leasehold, was large enough to comprehend both.

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*E cont.* For the residuary legatee, it was urged, that the exception of the estate purchased of *Saunders*, seemed to shew, that the devise was to be understood to be of an estate of a similar kind, and that this was a freehold; and the duration of the estate, which, by the limitation, was to be for ever, confirmed it.

6thly. What shall become of the £1000?

As to this, Mr. *Henley* insisted, that, as by the express terms of the charge, in default of her appointment, it was to go to her executor, she having made an executor, he was entitled to it.

*E cont.* It was contended, by Mr. *Attorney*, &c. that the power of charging an estate with this sum, to be disposed of as she should appoint, and for want of appointment to her executors, or administrators, could only entitle her executor in case she had survived her husband, and died without making any appointment. That though she had here named an executor in her will, that executor cannot be intended as her general representative, but only her representative *quoad* the subject-matter of her appointment; that the husband only is her general representative, and as such entitled to this money.

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The principal, and most material questions upon this will, arise from the last clause in it, whereby the testatrix gives all the rest of her goods, chattels, estates, and estate whatsoever, undisposed of, unto her kinsman, *Richard Churchill*, junior, his heirs, executors, and assigns, for ever; and appoints him executor.

Upon this clause two questions have been made, 1st.



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lands of which she had a power to dispose by the settlement?

Now there are different sorts of powers; power over an estate of another—power over one's own estate. Had this been a power over the estate of another, it would be going a great way to say, such an estate should pass under this general, residuary, clause; it is not to be presumed such could be meant; and, in the next place, the description (of which the word "my" is a part) would not have taken them in. It has been disputed, whether a *feme covert* could execute a power coupled with an interest; and it was held, she might, by the House of Lords, with the advice of the judges, in *Rich v. Beaumont*:\* that was a general power. But here the question cannot arise, because this power is expressly to be executed, whether *covert* or *sole*. This was originally the testatrix's own estate; she has settled it to herself for life, and after in strict settlement, with a power to dispose of it, in default of issue of the marriage; so that the reversion in fee was in herself, and, unless she disposed of it, would remain in her, and descend to her heirs. Beyond all question, then, the estate was hers, and the inheritance would have descended from her. What, then, is the difference between her case and that of a person who has a general capacity by virtue of the statute of H. 8? According to the general rule, the will shall operate as it may; as a will, as an appointment, or partly one and partly the other, *ut res magis valeat quam pereat*.

It could not operate as a will, on account of her incapacity by coverture: the lands are taken into the description by the word "my," &c., for the estate was hers,

\* 6 Bro. Parl. Ca. 152. Sugden on Pow. 156.

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visce ought to take only an estate for life in those, because the word "heirs" could not be carried forward, but the other three judges thought it the same, whether preponed or postponed: this, however, is stronger, for here the words of limitation follow the whole. No objection can arise from the words "executors, &c." for as the words "for ever," alone would carry a fee, the addition of executors, &c. can make no difference, and therefore the fee, I am of opinion, belongs to *Thomas Churchill*.

Another question there is, in respect to the lands contracted for with *Wm. S.*, whether she could devise those lands, as they were purchased by her out of her separate personal estate?

Where a *feme covert* has a separate personal estate, the general rule of the court has been, that she may dispose of it, or of any personal thing purchased with or arising from it, and several cases have been so determined; but if part of that personal estate is laid out in the purchase of lands, though those lands are the fruit of, and do arise from, that separate estate, there is no authority to say, she may dispose of them, for there comes in another person, an heir at law, to be disinherited, and he cannot be bound by any agreement of the husband. If there be an agreement between husband and wife, intended to enable her to dispose of lands, however strong, it would be of no force; for by no method can an heir at law of a *feme covert* be disinherited but by proper conveyance, fine, declaration of use, or appointment; by vesting the whole in trustees, in trust for such person as the wife, as the power is here, or by limiting it to such use as she should appoint, and then, when she makes an appointment, by the statute of uses that appointee takes from the original conveyance in which that power is created, and not from the particular instrument by which it is executed. Where lands are

purchased after, there is no trust, no use, that can give force to an appointment of them. But then with respect to *Saunders*, the contract not being executed, he, it is said, must be considered as a trustee, yet, as it is considered as a thing done, it must have the same legal and equitable constructions.

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I agree he is, in certain cases, to be considered as a trustee, but, had this been conveyed to trustees, a *feme covert*, without a particular power, can no more appoint a trust-estate, than a legal one. Therefore, as the purchased lands are not such as she had a power over, I am of opinion, they cannot pass by any part of her will, but must go to the heir at law.

But then here are purchases of leasehold-estates, and another question is, whether they are devised by the will? They must be so, in one part, or the other, of it: if they are not specifically devised, they will fall under the words goods, and chattels, into the residuary devise; for this, whether money, or leasehold-estates, is still personal, and subject to her power. The question, then, is between the brothers, whether or no the devise to *Thomas* includes the leasehold-estates, or only the freehold? I think it sufficient to take in both the real and personal; but as to the real, they cannot pass. Had not freehold-lands been excepted out of this devise, I should have doubted, whether or no any real estate was intended to pass by it: but for the words "for ever" in the limitation, the freehold-estates could not have passed only for life; this part of the limitation applies to them: the words executors, &c. are properly applicable to leaseholds only. Where a man having a freehold, and leasehold-estate, in the same vill, devises all his lands in that vill, to one, his heirs, executors, and administrators, would not all pass? I think they

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would, for he has used such words as describe, or apply to, his interest in both.

Then as to the £1000.—As she has made a will, and named an executor, though no particular appointment of this money, it is insisted, it shall go to the executor; on the other side, Mr. Attorney contends, as there is no particular appointment of it, it is to go to her general representative, her husband, not to her executor, who is made such, he says, for a particular purpose only. I think there is no ground for this; a *feme covert*, with the consent of her husband, may make a will, and that will, according to late cases in the spiritual court, will have probate, and the executor then become full and complete representative, for the husband cannot have administration. This money belongs then to the executor, and becomes part of her assets, out of which the contract with *Saunders* is to be carried into execution.

DECREE.—The plaintiff, then, I declare entitled to all the freehold-lands purchased, or contracted for, by the testatrix *Eliza Dibben*, during her coverture, for the profits of which the defendant *Thomas Dibben* is to account, as likewise for the leasehold-estate at *Porten*, and deliver possession. The defendant, *Thomas Churchill*, entitled to all the lands held by leases for years, purchased by the testatrix during her coverture, for which he is to have an account, and possession. He is likewise entitled to the inheritance of such part of *Mappercombe* farm, as by the settlement is subject to her power of appointment, for which the parties receiving the profits are to account, and deliver possession.

I declare the £1000 to belong to *Richard Churchill*, the executor, as part of her personal estate, the con-

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both parties bound themselves to each other in a penalty of £100, for the performance of their respective covenants. About twelve months after this, and before *Harris* had made any adjudication of the price, *Lady Wilmot* died, on whose death, her daughters, and co-heirs, the defendants, were admitted tenants, and paid the lord a fine, and fees, &c. which accrued to him by *Lady Wilmot's* death, which amounted, in the whole, to £120. Soon after, *Harris* made his adjudication, wherein, after reciting, that he had, with the assistance of surveyors, farmers, workmen, &c. calculated the real value of the estate, he adjudged the same at £660. Of this adjudication he delivered duplicates to each of the parties: upon which, the plaintiff applied to the defendants, gave them notice, that he expected a specific performance of the agreement, and sent his attorney with the money, to attend the manor-court, and receive a surrender; but the defendants refusing, he filed this bill, praying a performance, against the defendants, the co-heirs, and their husbands, and likewise against *Harris*. *Harris*, by his answer, stated, agreeably to the recital of his adjudication, that he had proper assistance in making it, and that, it was a just one, according to the best of his judgment. The other defendants insist, it was otherwise, offer to pay the £100 penalty, for that the estate was of double the value. Accordingly, they proved in the cause, by the oaths of persons skilled in those affairs, that they had surveyed the estate in *July* last; and thought it worth, to be sold, £1220. The plaintiff examined no witness to the value.

And now on the hearing, the objections insisted on for the defendants were, that this agreement was only in the nature of an authority, and, not being executed in the lifetime of *Lady Wilmot*, was at an end, and could not be proceeded in without the fresh consent of the parties. But, if the court thought otherwise, the difference between

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well execute it at one time as another ; and, if either party would have had him done it sooner, they should have applied to quicken him. That the plaintiff did right in examining no witnesses to the value, for that was not now material, and would have been giving up the point which he insisted on ; *i. e.* that, *Harris* being the person to whom that point was submitted by both parties, with a view, no doubt, to prevent any litigation that might arise from different estimates, as a person in whose integrity and capacity both parties thought they might confide, they were concluded by his adjudication. That the difference of the estimates taken by the defendant's witnesses, and that taken by *Harris*, only proved their judgment to be different from his, and, for aught appeared, his might be the just one ; or that, as the one was taken four or five years ago, and the other but in *July* last, that might occasion a real difference in point of value : that *Harris's* character was unimpeached, and, therefore, his adjudication ought to be adhered to. That it appeared, as well from the adjudication as from his answer, that he had proper assistance in forming his judgment : that this might be the occasion of his omitting it so long. That it was well known law, that the insertion of a penalty in articles of this sort, would not prevent a party from coming into this court for a specific performance of the agreement, if he thought that more eligible than an action for the penalty, for which was cited the case of *Hobson v. Trevor*, 2 P. Wms. 191. That the death of Lady *W.* before the adjudication was the act of God, which nobody could foresee or prevent ; and that the expense which it occasioned to the defendants, was a necessary consequence of that event, and no way imputable to the plaintiff, and, would have been the same, had the adjudication been made, unless the estate had been surrendered. That the plaintiff was no more consulted by *Harris*, or privy to his adjudication

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ference of the valuations of this estate can never be taken for the court to set aside the adjudication, for that is the very point submitted to Mr. Harris's judgment; and, were the court to set aside awards, where no improper partiality, or collusion, appeared, merely on the merits of the case, awards would answer no end; for those very disputes they are designed to prevent. It is very well known, that a party may come here for a specific performance of an agreement, notwithstanding the insertion of a penalty in it, and the case that has been mentioned shews it. The death of Lady *Wilmot* was the act of God; and the expense it occasioned to the defendants was unavoidable.

Therefore, let the contract be specifically performed, but, as it is a hard case on the defendants, let the parties abide by their own costs, other than *Harris's*, which are to be paid by the plaintiff.

## HICKENBOTHAM agt. OULD.

2 March.

Application to be relieved against releases, possession having been held in pursuance of them for 30 years, &c. refused.

IN 1705, two houses in *L.* were devised to the defendant, and his heirs, in trust to sell, and, with the money arising, to purchase a particular estate, in the country, to himself, and his heirs, &c. But, if that purchase could not be had, the defendant was to retain £1000, and pay the surplus, if any, to be distributed among the other legatees. The houses were then out at lease, at a reserved rent of £25 per annum, which afterwards expired, and, from that time, they were let at £110. The defendant put in advertisements for sale; but, not being able to sell them, he

filed a bill against the legatees, praying, that they might be directed to pay him his £1000, and take a conveyance of the houses, or, that, in default thereof, within a time to be limited by the court, they might be debarred all future claim. This cause abating, was never revived; but the legatees, knowing, as the defendant's counsel insisted, that the houses were not of sufficient value to raise the £1000, and interest; and, of course, that there could be no surplus, gave the defendant proper releases of their right, for very small considerations. After which the defendant laid out considerable sums in repairs. The legatees were all then adult; and from that time to 1751, (when they brought this bill, praying a sale, and to be paid the surplus,) they acquiesced in the defendant's possession.

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Mr. *Solicitor-General*, (*Murray*,) for the plaintiffs, objected to the reading those releases, because not proved (though upwards of thirty years' standing, and the person to whom they were given had been ever since in possession); insisting, that, as he was in possession before the releases given, the possession was independent of the releases.

But the court overruled the objection, and said, that on the rule of evidence, which permits deeds thirty years old to be read without proof of the execution, those releases, as the possession favoured them, might be read.

*Lord CHANCELLOR.*

All the persons entitled, in 1715, gave particular releases, for a consideration, in each of which there is a full and fair recital of the fact, so that they had the clearest notice of their right. Had these releases been general ones,



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I should not so much have relied on them. Now, thirty-five years after, they apply to be relieved against those releases. A mortgagor would not be permitted to redeem, after such a length of time.

*Mr. Solicitor.*

The strength of the case lies here: the releases are obtained from the administrators, who are trustees for the next of kin, on a false suggestion. The will, indeed, is truly recited, but a recital follows, that the estate was not sufficient to answer, which, we contend, was not the fact. It may be said, in respect of the people themselves who released, that they did it with their eyes open; but, as to the administrators, it would be hard, if the next of kin, who are the persons entitled, should be barred by a transaction of this sort.

*Lord CHANCELLOR.*

If any ground existed for suspicion of fraud, and collusion, between an administrator, and another, no doubt, both the administrator, and the other person, who contrived a *devastavit*, would be liable; but here is no foundation for any thing of that sort. However, the defendant has had a good bargain, so dismiss the bill without costs.

SCOTT *agt.* ELLERS.

2d March.

*PAUL ELLERS*, in 1729, gives a bond to his father, upon which no interest was ever paid, or demanded; but, in 1742, his mother, who was representative of the obligee, endorses it thus, "*Paul Eilers's* bond, which I give to my daughter *Scott*, 1742;" of which she afterwards takes notice in her will, which was drawn by the obligor.

Debt on a bond, held subsisting: and principal, with interest, to be paid the plaintiff; circuitry needless.

It was now objected, that, as this bond was of so long standing, and the endorsement the only memorial of keeping up the debt, there being no pretence of interest paid, or demanded, it must be presumed to have been paid, or, being from a son to a father, it was never intended to be called for. If not, no probate of the will appearing, they cannot give a proper discharge. But

*Per Cur'.*—It is common for an assignee of a bond, who cannot bring an action in his own name, to apply to this court, to be paid the interest and principal: he might, indeed, pray a circuitry, *i. e.* that the trustee might bring an action at law, but the other is the more usual and best method.

A very little evidence would have been sufficient to induce the court, to think this money intended to be given by the father to the son; but here is a recital in the mother's will, which was drawn by the defendant, that the debt was subsisting; can there be a stronger admission of the subsistence of the debt than this? which he certainly would never have drawn, had the money been paid, or been looked upon by him as a gift.

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2d March.

**HENDRICK agt. WINTER.**

Agreed in marriage-articles, that a portion shall be paid, and a settlement made; but that payment is to be withheld, unless the settlement be made within a limited time. After the marriage, the settlement is not proceeded with, and now held, that the latter clause could only be intended to hasten the marriage-settlement, and that the right to the portion is independent of its observance.

By articles, on the marriage of the plaintiff with the defendant's daughter, in 1742, the defendant covenanted to pay the plaintiff, as her portion, £200, in consideration of which the daughter released to her father £100, to which she was entitled under his marriage-settlement. The plaintiff, on his part, covenanted to make a settlement on his wife, and the issue of the marriage; and then was a clause in the articles, that the money should not be paid, unless the settlement was made in four years; but the interest was to go on afterwards, though at a different rate, until the settlement was made. In 1748, the wife died, the money not being paid, nor any settlement made. And this bill was now brought to be paid that money. On the part of the defendant, it was proved, that he called on the plaintiff, to make the settlement, in his daughter's lifetime, and he had refused to do it.

On the part of the plaintiff, it appeared, that his wife was in such a sickly way for some years before her death, that there was no probability of her having issue; and this, it was now contended, was the reason of the plaintiff's refusal to make the settlement.

Mr. Attorney-General, (*Ryder*), for the plaintiff, urged, that where there are mutual contracts, and particularly in cases of marriage, they are considered, as between the parties themselves, as actually executed. That one is to begin, and the other to follow, makes no difference, for it is the making the settlement, and the payment of the money, and not the manner of doing it, is the sub-

stance of the contract; nor is the plaintiff's refusal to settle at all material, because he was compellable to do it, and for this he cited two cases, determined by the present Chancellor; the first was *Katt v. Farr*, 10th June, 1746, which he stated thus; the plaintiff brought his bill to compel the defendant, his wife's father, to surrender a copyhold-estate to him and his heirs, on a foundation of a marriage-contract, by which the plaintiff agreed to make a jointure on the defendant's daughter of two farms of £170 a year, and to do it within three months, free from an incumbrance then affecting it. The father contracted, in consideration of that jointure, to surrender a copyhold-estate of £80 a year to the plaintiff, and his heirs. The husband having made no settlement, the wife died about ten months after, by which the settlement became immaterial. The father insisted, that he was not bound to surrender, because that was to be done at the same time the jointure was to be made. And the question was, the husband not having complied with his contract, by making the settlement within three months, and it was now substantially impossible to make it at all, whether the defendant was obliged to surrender? And the court held, that these were mutual agreements, which each party had his remedy to compel the performance of, and were to be considered as actually done. Your Lordship accordingly decreed, that the father should surrender the estate, though it was a real one, and he was not bound at law.

The other case was that of *Parsons v. Freeman*,\* 5th Oct. 1751. Mr. *Freeman* entered into articles with his wife, by which he covenanted to make a jointure of £1000 a year; she, by the same articles, covenanted, that when he made a settlement, pursuant to his covenant,

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she would settle her real estate to him in fee. He never made any settlement, though he had sufficient estate, but he made a will, and devised his wife's estate to J. O. in fee, after which, he and his wife joined in a conveyance to such uses as he should appoint. The questions were, 1st, Whether the representative (heir or devisee) of the husband had a right to have the wife's estate conveyed to him? 2d, Whether the devise was a good one? And, if so, 3d, Whether it was not revoked by the conveyance? Though it was insisted, her covenant was only to be performed when he performed his; the court thought the covenants mutual, and ought to be considered as done, and decreed a conveyance accordingly. The devise was held a good one, but revoked by the conveyance.

Lord Chancellor interrupted the *Solicitor-General* (*Murray*) who was about to have spoken on behalf of the defendant, and said, this was a case plainly within all the rules of construction of marriage-articles, where the portion is always considered as the consideration of the marriage, and, when the marriage is had, the husband is entitled to it: when the parties regulate the time of payment, and restrain it till the settlement is made, this is considered as done only to hasten the making it. Such was plainly the intention in this case: interest is here to be paid, if the portion be not paid within four years, so that interest, if not principal, is to be paid for ever. Besides, here is a stronger circumstance in this case, and that is, the portion is purchased by the release. As the uses of the settlement are spent, it is not now to be made. But let the defendant pay the plaintiff the portion, with costs.

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The widow afterwards married *Edmond Wharton*, who survived her, and is her representative, and like *Wharton* one of the executors of *Petty*, the father.

This bill was brought by *Robert Wharton*, as representative of his brother, against the executors of *Ma Petty*, to be paid the £2000, pursuant to his contract.

*Mr. Attorney-General (Ryder)*, for the plaintiff,

The whole £4000 was considered, by all the parties as the portion of the wife; and, as such, to be the property of the husband, but subject to certain contingencies on which the present questions arise; and those contingencies, on which it was not to be paid him, I submit, have never happened. The postponing the payment of a sum of money, to depend on a future contingency, will not prevent the person's having an interest, in some sense, vested though contingent, by which I mean such an interest, that he, or his representatives, will be entitled to receive it, whenever the contingency happens.

The general question is, whether the contingency, upon which the proviso, that is to discharge the covenant of payment of £1000, is to take effect, has happened. This proviso is, that, if the wife died before the husband, leaving no issue, or if such issue should die before *Petty*, his executors should pay to *Wharton*, if then living, £1000 in discharge of the covenant for payment of £2000. So here are two contingencies, either of which happening, this proviso was to take place. The first was, the wife's dying before her husband, leaving no issue; this has not happened, for she survived him. The second was, the death of such issue (i. e. such issue as she, dying before her husband, should leave) in the lifetime of *Petty*. This could not happen, because there never was any issue.

Neither of the contingencies then having happened, there is no end of the question, the proviso cannot take effect, and the whole £2000 is due. But, had the contingencies happened, what then? It is not said, that the £2000 shall not be due, but that the executors of *Petty*, upon payment of £1000 to *Wharton*, if living, may redeem it, and discharge the covenant. *Wharton* was not then living, and, consequently, could not receive it: that, therefore, cannot be done; the doing which was necessary to discharge the executors from payment of the £2000; so that it is now the same case, as if there had never been any proviso. It may be said, that their meaning was, that if there should be no wife, or issue, at *Petty's* death, the £2000 should not be paid: had that been their meaning, it might have been expressed in very few words. But here the covenant for payment is to be discharged by a certain act, on certain contingencies, which act cannot be performed, and which contingencies have not happened.

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It seems to be hinted, as another question, whether as the wife survived, in case the £2000, or the £1000, be payable, her representatives, or those of her husband, are to be entitled to it? And, on this point, I submit it, as known law, that the husband having made a settlement on his wife, in consideration of her fortune, is to be considered as a purchaser of that fortune, (as in the case of any other special contract,) and, therefore, if she was entitled to receive it, she must, in this court, be considered as a trustee for the husband.

*Mr. Solicitor-General (Murray)*, on the same side.

The question is, whether the executors of *Petty* are discharged by any clause in the settlement from the cove-

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want for £2000 on any event which has happened. The events which have happened are, that there was no issue of the marriage, and that the wife survived her husband, and enjoyed his settlement a long time; so that the events in which £1000 was to be paid, have not happened, and, therefore, the plaintiff must be entitled to the whole, or to nothing.

The proviso being out of the case, the whole £2000 is to be paid, pursuant to the covenant, to the trustees; but certainly not for their own benefit. The declaration of trust which follows, must determine to whom it belongs. The trust declared is, that it shall be placed out at interest, and that interest be paid to Mr. Wharton for life, after, to his wife for life, after, to the issue of the marriage, in such proportion as they should direct. The trust is carried no further; and their argument is, that this is a declaration of a trust of money belonging to Petty, and, therefore, whatever interest in it is undisposed of, remains in Petty. He has only disposed of it in particular events; those events have not happened, and, therefore, the contingent interest is a resulting trust for his benefit. In answer to this, it is clear, that, when a husband settles for a portion, he is entitled to it, unless it be otherwise provided. £4000 is here recited to be the portion, and was the consideration of the settlement; £2000 is paid down, but, in favour of the father, the payment of the other is to be postponed till after his death. Had it not been for the provision for the children, the husband would have been immediately entitled to the whole; as it is for the benefit of the children only, that the general right of the husband is to be restrained, there being no children, it is clearly his. But for the proviso, the whole tenor of the settlement shews, that this £2000 is to be paid the husband; but the proviso directed, that, if the wife had



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for whether living or dead the estate would be discharged in those events from this settlement, and no matter of reason can be given, why the £1000 should not be payable to the representatives of the husband, as well as to himself. Without this proviso, had the husband survived the father, he would have had a right to have had this £2000 placed out, that he might receive the interest of it during his life; no, rather than submit to that we will come to a composition; rather pay you £1000 to your own use, than have £2000 taken out of my estate, which, on your death, must revert to it. If the wife and children were dead, and the husband living, we contend, £1000 only is to be paid; but, if the wife, and children, and husband, were all to die before the father, nothing would be payable: it seems extremely unreasonable, the husband's representatives should be in a better situation than he would if living, in which case, he would have been plainly entitled to no more than £1000.

*Mr. Henley*, on the same side.

The question between us will depend on this point; whether the husband became the absolute purchaser of this capital sum of £4000, subject only to the limitations mentioned in the settlement? If so, the purposes of those limitations having been answered, it becomes a resulting trust for his representatives. On the other hand, if he purchased only a contingent interest, then, the purposes of those limitations having been answered, it will result for the benefit of Mr. Petty's representatives, whose money it was.

It seems extremely odd, that Mr. Wharton should stipulate, that, in case of his death, twice as much should be paid to his representatives as he would himself be entitled to, if living. They have attempted to put both sums of

£2000 on the same footing, but, I think, there is a manifest difference; for though the first £2000 be put into the trustees' hands, to answer the particular uses of the settlement, yet *Wharton* is the person who gives the discharge for it, and, therefore, must be considered as the person who deposited the money in their hands for certain uses, which being partial and contingent, and having been spent, the remaining interest in it results to him by whom it was advanced, viz. Mr. *Wharton*; whereas the other £2000 rests only in covenant till the death of Mr. *Petty*; and the proviso seems to operate to separate that covenant, and apply it to the events which might happen; for, being executory, it may be suited to the then state of the family. If this proviso were out of the case, the husband, though the wife was dead without issue, would be entitled to the interest of the £2000 for life; but, as the connection between the two families would, in that event, be at an end, this proviso was inserted, to put a final end to all accounts between them, by paying him £1000, instead of this interest.

Mr. *Wilbraham*, on the same side.

In this contract there could be no other view, than the making a reasonable provision for Mrs. *Wharton*, and the children of the marriage. Though £4000 is recited to be her portion, no such inference as the gentlemen contend for, can be drawn from thence, for the settlement is inaccurately penned, and that was inserted, because, your lordship sees, it might, in certain events, have been her portion. The court has, in many instances, had a great regard to the adequateness of a settlement. In the present case, it is obvious, though we know nothing of the value of the lands settled, that it was not an adequate settlement, because the whole of the lady's fortune, whatever that be,

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was settled as an addition to it. The proviso surely imports, that, in some event, £1000 only was to be paid; instead of £2000; does not that imply, beyond a possibility of doubt, that the whole £2000 was not considered as the property of, or purchased by, Mr. Wharton; and there is no stipulation, that more than £1000 should be ever paid to him, though it is now contended; his representatives are entitled to £2000.

Lord CHANCELLOR.

You need not reply. This is a very obscure scheme of a marriage settlement, and the question made on it is a question, not of law, but of construction. If that contended for by the representatives of Mr. Petty be a just one, I wonder they did not bring a cross bill against the trustees for the other £2000, for they are equally entitled to both.

The question arises from the declaration of trust; and the proviso. Upon the declaration of trust, considered by itself, it is agreed, on both sides, that this £2000 will be a resulting trust in the hands of the trustees; but then the question is, for whom? And that must depend upon the construction of, where is the property? Now, where there is a marriage, and a contract for a portion for the wife, and the husband, in consideration thereof, makes a settlement on the wife and her issue, notwithstanding the restrictions put upon the wife's fortune, though it be vested in trustees for particular uses, yet, if it is stipulated as the marriage portion, and in consideration of the settlement, the general property, subject to these limitations, is considered here as belonging to the husband, unless the parties have provided otherwise, for he is looked upon as a purchaser. Wherein does this case differ, or what is there to take it out of that general rule? It is recited as being the

marriage portion of the wife; by which words, and by force of them alone, the husband has, in many cases in this court, been considered as a purchaser; and more strongly so where the wife has abided by, and enjoyed, her jointure, as in this case.

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The discharge and receipt for the first £2000 was given by Mr. *Wharton*, which plainly imports, that it was considered, generally, as his money; but, to prevent its being wasted, it is to be vested in trustees, for the benefit of his family. Then, as to the receipt or payment of this money to the good liking of Mr. *W.*, it is acknowledged by him; so likewise an acknowledgment is taken from him of the security of the other £2000. On this part of the case, therefore, it is clear, all the £4000 was considered as his property; where it is paid, he acknowledges the payment; where it is secured, he acknowledges the security. Then comes the covenant, which is an absolute one, for payment of £2000; and then the declaration of trust, which includes both sums, and subjects both to the same uses. In this there is a great inaccuracy in the *passing*, for the power of appointment seems literally to relate only to the interest, yet it is admitted, the children would have been entitled to the principal. It is not pretended, that, in the events that have happened, the representatives of *Petty* have a right to be repaid the first £2000, though they have an equal right to it; for what does the argument for the defendant depend on? that the uses go no farther than to the husband, wife, and issue; and that the remaining interest is a resulting trust for *Petty*. If this be so, it is as much so in the case of one £2000 as the other. What then prevents? why, the whole tenor of the deed in which the husband is considered as a purchaser of the whole. I can see no manner of difference as to the resulting trust, between the one case and the other; and it would be absurd

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to say, that the wife should enjoy her jointure so long as she lives, viz. from 1728 to 1746, and it might have been much longer, and yet on her death her family shall have a right to be repaid her whole portion.

On this part of the case, therefore, it is clearly with the plaintiff. But I do admit, that this declaration of trust must be construed together with the proviso, which proviso makes the payment of this £2000 dependent on a contingency; such a contingency, however, as, I think, has not happened. If the plaintiff is not entitled to the £2000, he is not entitled to any thing, for the event on which the £1000 was to be paid has not happened. This £1000 was to be paid in full satisfaction and discharge of the covenant, but to whom was it to be paid? to the person who, if their argument be right, would not be entitled to a single shilling in the event that has happened. But, say they, Mr. W. would have been entitled to have had the whole laid out at interest, which, to be sure, in the best way they could consider it in; yet that must be on a supposition of his surviving his wife, his children, and his father-in-law; and, in that event, £1000 was no more than a composition for it, the doctor appearing to have been a man in years.

I am of opinion, therefore, notwithstanding the darkness of the case, the parties considered it in the light the counsel for the plaintiff put it, *i. e.* that as neither the wife nor children, in the event provided against, would be entitled to any benefit from the settlement, they might think it reasonable to keep back part of the portion.

The principal difficulty remaining has been mentioned, and arises from the words, *if then living*, in the proviso. It appears odd, but I take it that they mean, that the

~~£1000 should be paid, if the wife, and children, and father-in-law died before the husband, so that no benefit could be drawn by them from the estate of either.~~

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Upon the whole, I think this is the best construction that can be made in so dark a case: but, as it is a nice point, I shall decree the money to be paid by *Petty's* representatives, but without costs on either side.

## FENOULET agt. PASSAVANT.

March 8.

FERMANT, a French refugee, residing in England, Testator appoints executors in trust to pay the interest of £1000 to his son for life, then to his son's children, and, if he left none, or they should die unmarried, and under age, bequeaths a moiety of the principal unto *G. W.* and his wife, makes his will, dated the 9th of March, 1713, in French; and thereby (*inter alia*) directs his executors to keep in their hands some tallies on the government of Great Britain, amounting to £1000, and to pay the interest thereof to his son, *Moses Fermant*, during his life, and after to his children, and, in case his son should die without children, or should leave children, and they should all die unmarried, and under age, he gives one part thereof in these words, "*a George Wildey et sa femme ou leur enfants et representants*," and the other part thereof to *Josiah Lecompte*, and his family, (the said *G. Wildey* and *J. L.* paying £20 per annum to Mrs. *Fermant* for her life,) and, if his son died without issue, the principal was to

or their children, and representatives. Held, that the estate which passed on the death of the testator, under the second disposition, was consonant to that limited under the first, not absolute, or vested; but remained in contingency, till the event of the son dying, or his issue failing, &c. determined to whom it belonged; the parents, if then living, being entitled, if not, in the next place, their children, or, finally, their representatives. A devise of a copyhold surrendered, &c. signed only by the testator, is sufficient.

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contend, make it a vested interest in the father, but only serve to make him, his wife and children, entitled as joint-tenants to this legacy; so that, in either case, the plaintiff will be entitled to the whole as survivor; and that it was the testator's intention she should be so, is the more probable, from this observation, that, in the former part of his will, his bequest to his son was only for life, and, after, to his children, and, if any child should die, his share was to go to those that survived.

Then, to the second question, that the testator's word *real*, in this residuary bequest, was not meant to dispose of his copyhold-estate, but inaccurately used, and explained by the subsequent words, which restrain its sense to things personal merely: and, though the word *real*, had it stood there, would have included the freehold, as well as copyhold-estate, it was the more probable nothing of that kind was intended to pass, as the testator had not observed the requisites prescribed by the statute, to a will for such purposes, in point of execution.

Lord CHANCELLOR.

There can be no difficulty in the second question, for it has been determined, that a will, duly signed by the testator, is sufficient to pass copyhold lands which have been surrendered, as a declaration of the use of the surrender, though not attested in the manner the statute prescribes, *Tufnell v. Page*, (2 Atk. 37.) Then, as to the words, they are oddly penned, but, however, I think sufficient. It is a devise of all his real and personal estate; had it stopped there, there could have been no doubt; but it is contended, the subsequent words are an explanation, and restrain it to personal things, as goods, book-debts, &c. That construction cannot be just; for how can such things be relative to his copyhold-estate?



Mr. Solicitor-General (Murray), for the defendant.

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It has been argued two ways for the plaintiff, either that the reversionary interest is given to *G. W.* and *J.*, his wife, and their children, as joint-tenants; or, that the testator intended it should not vest in any body till after the death of *M. F.*, and then meant to give it to *G. W.* and his wife, or their children, which should be then living. But, I apprehend, neither of these constructions are agreeable to the testator's intentions, which seem to me to have been, that this reversionary interest should vest at his death, but, to prevent a lapse of the legacy by the death of *Mr. W.*, and his wife, in his lifetime, he adds a limitation to their representatives, considering their children as such.

To go over their construction: It is clear the testator did not mean to make them joint-tenants, for the children being then alive and named in the will, if he had meant to give them any immediate interest, he would have given it them by name; besides, he gives it upon condition, that *G. W.* paid an annuity, &c.; if the fund had been given to four persons, would the condition, on which that bequest was to take place, have been laid on one of them only?

The other way they put it in was this; he meant, say they, it should vest, on the death of *M. F.*, in *G. W.* and his wife, if then living, if not, in their children then living. To whom do the words "*leur representants*" relate? It seems manifest to *G. W.* and his wife, and not to their children; "*a leur enfants et representants*," i. e. the children and representatives of the persons before mentioned; children and representatives are words properly used here as synonymous, as heirs of the personal estate. Now, wherever a bequest is to a person as representative, it is certainly the testator's intention primarily

1754.  
FENOULET  
agt.  
PASSA-  
VANT.

to give it to the stock ; but, lest that person should die in his lifetime, to prevent a lapse, come these words, as words of limitation ; with this alternative, if they survived it should vest in them ; if they died before the testator, in their representatives. Besides, the charge of part of £20 a year to the widow of Mr. F., on which G. W. was to take, being laid on him only, if he died before the testator, unless his children take as under him, they would have it free from this charge. On the whole, I hope, it is clear, the testator meant, if G. W. and his wife survive me, I give it them ; if not, I give it their children, as their representatives.

Mr. Wilbraham, on the same side.

To construe this bequest, a joint interest in the father, mother, and children, is a harsh construction, and will not be come into by the court, if it can be avoided. It is not like *Wylde's case*\*, where a devise being to a man, his wife, and children (and children being then alive), it is plainly a joint-tenancy ; but this is a devise to G. W. and his wife, or their children ; which word *or*, though it be sometimes taken for *and*, to make a sentence intelligible, is by no means synonymous ; and, as to their other construction, the court will not keep the estate in contingency longer than they can help it, but will always lean to the vesting of estates (*Danvers v. Earl of Clarendon*, (1 Vern. 35.) *Blackburn v. Edgley*, 1 P. Wms. 606.) what, then, can be the true construction, but this, that the estate was intended to vest absolutely in G. W. and his wife, but, lest they should happen to die in the testator's lifetime, that it might not be considered as undisposed of, the words, children, and representatives, are added. Where a contingent interest may happen to vest in possession in a man, it is

\* C. Rep.

transmissible; where that cannot happen, it is not transmissible.

1754.  
Cm  
FENOULET  
10 10 23 1  
agt.  
PASSA-  
TANT.

This bill contains a great many scandalous charges on the defendant, relating to her management of the testator's affairs, &c., which she referred for scandal; but, as the defendant, by her answer, had not admitted assets, the court, on exceptions to the master's report, did not agree with the master, who made a report in her favour, though the charges appeared very scandalous, merely because assets were not admitted, as the charges, if proved, might be relative to them, and then would not be scandalous; but nothing of this kind being now proved, we hope the bill, as to those parts, at least, will be dismissed with costs.

Lord Chancellor took a day or two to consider, and then gave his opinion.

Upon consideration, I am of opinion, that the surviving child of *G.* and *J. W.* that was living at the death of *Moses*, the son, is entitled to this legacy, and that is the plaintiff. My reason is this; the testator, in the disposition of it, had regard all along to the stocks of families. In the first instance, he gives it to his son, but for life, and then to his children; so that he had regard to the son and the son's children, and did not give him the absolute property, but only an usufructuary interest. When he comes to give it over, he shortens the description, but has plainly an eye to the same kind of limitation. Supposing the first part of the bequest out of the case, what is the next disposition? In case the children of his son should all die unmarried, &c. he gives the part now in question to *G. W.* and his wife, or their children and representatives. Here the description and the particular parts of the bequest, are made much shorter, but must, I think, have reference to the former.

1754.  
FENQUELTON  
agt.  
PASSAY  
VANT.

I think the words will sufficiently answer the construction I make, on taking a small, and not an unusual liberty with them: what is the event and point of time he had in view, when this bequest was to take effect? why, when the event falls out either way, either the son's death, without children, or leaving children, and such children dying unmarried, and under age. For the defendant, it is contended, that the testator meant to give it absolutely to *G. W.* and his wife, and that the words "children and representatives" are only made use of as words of limitation, to prevent a lapse. For the plaintiff, it is contended, that the word *or* should be turned into *and*, but that will not answer the plaintiff's end, for that would be to make a man joint-tenant with his representatives, which cannot be. But I am of opinion, the last copulative, *and*, should be construed *or*, and then it will be a bequest to *G. W.* and his wife, or their children, or representatives; and that the testator's meaning was this, if *G.* and his wife were living, they should take; if they were dead, leaving children, those children should take; if no children, then their representatives should take. To this there was an objection made by *Mr. Solicitor*. The testator plainly meant, says he, that *G. W.* and *Lecompte* should take the whole, because the bequest is upon a condition which is to be performed by them only. This condition, to be sure, is very oddly expressed; but I am of opinion, the testator made use of their names to express the several stocks, and that this condition was to be discharged out of the several dividends limited to them and their families: and this is confirmed, by his making these very people *W.* and *L.* his executors, in trust for these limitations. Besides, he has not expressly subjected *W.*'s wife to the condition, yet they would have it, that the testator meant to make her and her husband joint-tenants; so that their own construction is inconsistent with, and destroys, that argument.

Here a question arose, whether the defendant was to pay this money, in case assets should prove short, as a specialty debt, or a simple contract. And as it appeared, *G. W. and L.*, on dividing this £1000 between them, gave each other bonds of indemnity, the *Chancellor* held, that *G. W.*'s bond, though given to a third person, made it a specialty debt of his, and as such, to be paid by the defendant out of his assets, in a course of administration. That, in case the personal estate of *T. W.* be insufficient for debts, funerals, and legacies, the copyhold estate is liable to make good the deficiency; and, if all the funds before mentioned fall short, as to specialty debts, the freehold descended to the plaintiff is liable, and to the simple contract creditors, *pro tanto*, by circuitry in the same manner, but not to the legatees.

1754.  
RENOULET  
agt.  
PASSA-  
VANT.

Decreed accordingly, reserving the consideration of costs, as to so much of the suit on which these directions are given. But, as to all other parts of the bill, let it be dismissed with costs, as against all parties; the charges reflect greatly on the defendant's character, and, as they have not been proved, they ought not to have been inserted.

HICK agt. MORS and WELLS, et c<sup>on</sup>.

March 1.

THOMAS BALDWIN, being seised in fee of a moiety of an estate of £24 a year in possession, and of the other conveyance, on a clear manifestation of fraud, a will previously made to the grantee under the deed, has been revoked by it, and is rendered again valid by annihilating the deed? Held, that any deed shewing an intent to make a different disposition, is a revocation of a will; and that in the present case, the whole being one transaction between the same parties, the court would not set up the will, though, had the devisee been a third person, much might have been said in his favour. *Ambl. S. C.*

1753.

Hick

agt.

Mortg.

moiety in reversion, subject to his mother's estate for life, and likewise of a remainder in tail (expectant on the death of his mother), with remainder over to his sister in tail, remainder to himself, in fee, of another estate said to be worth £109 per annum, makes a mortgage to one *Wade* for £50, which was afterwards increased to £120, and assigned to *Hick*, whom *Baldwin*, being engaged in some law-suit about these estates, employed as his attorney, and to whom, the 10th of *June*, 1749, he makes another mortgage for £100, as for money then advanced to him, and, on the back of the deed, gives a receipt for it as then actually received. By this mortgage, he declares the uses of a fine, then lately levied by him, of all his lands, to *Hick* for 1000 years, by way of mortgage for his £100, remainder to such uses as he (*Baldwin*) should appoint, remainder to him in fee.

The 10th of *May*, 1750, *Baldwin* makes a will, and thereby devises his whole estate to *Hick*. The 24th of *May*, 1750, he executes a conveyance, reciting his mortgage to *Hick* for £100, *Wade's* mortgage for £120, that the premises were subject to an annuity of £20 per annum to his mother, and that *Hick* had agreed to release a debt of £200 due to him for money laid out, business done, &c.; in consideration whereof, and of an annuity of 10s. a week, to be paid him (*Baldwin*) for life, he conveys his whole estate, subject to these incumbrances, to *Hick* in fee; and, by another deed, assigns to him, likewise, for the same considerations, an annuity of £20 a year, to which he was entitled, together with the arrears thereof (then amounting to £100 and upwards). *Baldwin* dying soon after, these suits were instituted between his representatives and *Hick*, and the cross cause was a bill brought to set aside these conveyances, as obtained by fraud. By his answer, *Hick* admitted, that the £100 mortgage was not paid, but was for a bill of fees, which

bill had not been delivered; and though in the deed another £100 was said to be due to him, which he was to release, he did not pretend, by his answer, that any thing was due to him besides the mortgages. It appeared likewise in the cause, that, though it was recited in the deed, that the premises were charged with an annuity of £90 to the mother, she was, in fact, entitled to no such annuity. And it was further proved, that *Baldwin* was a very dissolute, drunken, idle, weak fellow, that he lived in an alehouse (kept by *Wade*, the first mortgagee,) followed no business, and was perpetually drunk: but there was no proof of intoxication, or any particular act of imposition, at the time of obtaining the deed from him.

1724.  
Hick  
agt.  
Madd.

On the part of *Hick*, it was sworn, that the witnesses believed *Baldwin* was not liable to be imposed upon, that he was in great distress, and *Hick* advanced him money, and that they believed, this conveyance, and will, were made out of gratitude for it; and one of the witnesses to the will swore, that, at the time of executing it, *Hick* told him he did not desire the will, if he would pay him his bill; to which he replied, that he should have it, for he was his best friend.

Upon this case, two questions were now made.

1. Whether or no this is a sufficient ground to set aside the deed, as obtained by fraud.
2. If there be, how far that deed, being set aside, can affect the will, as a revocation of it?

For *Wells* and his wife, the sister and heir of *Baldwin*, it was contended, by Mr. Attorney General (*Ryder*), and Mr. *Yorke*, that here are many grounds for a supposition

1754.

*Hick*

agt.

Mons.

of fraud; as, in the first place, the condition of *Baldwin* himself, his drunkenness, and weakness, &c. in consequence of it; to which the only answer given is, by producing witnesses, who believe he was not liable to be imposed on, but they have not controverted the circumstances on which the imputation of weakness was founded, viz. his living in an alehouse, and being constantly drunk. That it was impossible for the heir-at-law to prove, that he was incapable of knowing what he did through intoxication, &c. at the particular time of the execution of the deeds, as the whole transaction was between him and *Hick* only, and no other person privy to it. That *Baldwin* was then a client of *Hick's*, and that the distresses, under which he laboured, appear from *Hick's* own answer, to be owing to his pressing him for his fees, in a cause then undetermined, which *Baldwin* being incapable of paying, conveys the estate as a security for them, though this very estate was the matter in question in the suit. It is sworn, that, at the time of making the will, he told him he did not desire the will, if he would pay him his bill, and yet, fourteen days after, he obtains from him a conveyance of his whole estate, including that in which the mother had an estate for life, the reversion of which they intended to have made, and thought they had made, his own by the fine, though it turns out otherwise, there being a remainder to his sister, which the fine could not bar.

But, taking it at the lowest, there is a moiety of £24 a year in possession, the other moiety in reversion, and an annuity of £20 a year, conveyed for considerations, which, if just, were no way adequate to the value; but the greatest part of them, viz. the £100 mentioned to be due to himself, and which he was to release, and the annuity alleged to be payable to the mother, &c. were, as



1754.

HICK

agt.

MORS.

The 16th of the same November he died; and the heirs-at-law brought a bill, charging a joint fraud on *Wade*, *Wildman*, and the devisees, who made a joint defence, and joined in a cross bill. The court set aside the lease and release, and totally on account of their joining.

Before the House of Lords, having considered their case better, the devisees insisted on their innocence, and, that *Wade*, and *Wildman*, were the sole contrivers of the deed, and, therefore, the will ought to be set up again, and they ought to have an opportunity of contesting the validity of it, and that the heirs-at-law ought not to be at liberty to make use of the deed, if it was set aside, to destroy the will; but the House of Lords, on account of their joint defence, thought them all *participes fraudis*, and affirmed the decree. Could they have made a clear case of their innocence, it might have been otherwise, in respect of them.

Mr. *Solicitor-General (Murray)*, for the defendant, *Hick*, seemed, in some measure, to give up the first question; but strongly contended, that, if the court should think the deed ought to be set aside, on account of its being obtained by fraud, it must be laid entirely out of the case, and the will would remain unaffected by it, supposing that fairly obtained.

If the deed is good, it is a revocation, if it is not a good deed, it is no revocation, for the court must presume, that the grantor did not intend to grant, and, therefore, it is, in fact, no deed of his. With regard to a personalty, and, in the present case, the arrears of the annuity are of the personalty, a conveyance after a will is an ademption, a revocation *pro tanto*, but, if the deed be set aside for fraud, the will will be effectual, and independent of it.

In regard to the real estate, I submit, whether there is any revocation at all, even supposing the deed a good one, for the deed is a revocation only as it is a contradiction. What had Baldwin to devise when he made his will? a contingent reversion in fee, to take place for want of his own appointment, and the will, just as it would have done had the power of appointment been in a third person, carried that contingent fee, subject to the power of appointment. Then comes the deed, which was only an execution of that power, not a conveyance of his contingent interest. Had a third person had the power, and made the appointment, would that have been a revocation of the will? Certainly not.

1754.  
H108  
agt  
MONS.

Lord CHANCELLOR.

This reversion, though subject to the power of appointment, was a vested one, and, therefore, passed by the conveyance.

Mr. Solicitor.

Admitting the deed, if a good one, would have been a revocation, it will not be so, if set aside. The cases alluded to, of bargain and sale, without enrolment, &c. depend on the intent of the party, and on that account only are revocations; but this deed can be set aside on no other footing than that of its being contrary to the grantor's intent. To make this a revocation then, they must intend, that he intended it as a conveyance to revoke, though not as a conveyance to pass. If he did not intend to pass, he certainly did not intend to revoke: if it conveys nothing it revokes nothing; it is only a revocation as it is a conveyance. Every instrument stands on its own foundation; if the court sees reason to set aside a deed, on a supposition of its being obtained by fraud, the court does not, therefore, deprive the party guilty of that fraud



transactions are related, a court of equity may as well be abolished. This unfortunate man, *Thomas Baldwin*, appears to have had an estate, one moiety in possession, the other in reversion, after his mother's death, of £24 per annum, and was, besides, entitled to £20 a year during his mother's lifetime, and, after her death, to another estate in tail, which he had barred, as far as related to his own issue, by a fine: but the entail on his sister, the plaintiff, was not barred, though the reversion in fee, even of that too, passed by this conveyance; and this estate is said to be worth £100 a year, though perhaps that may be more than the value. The grounds of setting aside are fraud, and imposition. 1st. In the circumstances of the person, about which, I am fully satisfied, that he was a poor dissolute anthrift, weak of mind, not naturally, but from the habitual ill practices he had given in to, took to no business, and lived at an alehouse; and the circumstances of his body as bad as those of his mind, for he was in an apparent state of beggary, almost eaten up with vermin. In this situation, he makes a mortgage to the alehouse-keeper for £50, and afterwards increases it to £150, and that is assigned to *Hick*. *Hick* was this man's attorney; and being so, in June, 1749, he takes a mortgage for £100 as for money lent, and a receipt for it as then actually paid. It is now admitted, that this £100 was not paid, but was for a bill of fees pretended to be due. No pretence, that this bill was ever delivered, or inspected by any body, and the suit was then depending in which those fees were incurred. Had *Baldwin* been living, the court, on motion, without any cause, would have broken into this mortgage, taxed the bill, and let it only stand as a security for what was really due. A fine being levied on this occasion, the uses of it are declared, by this mortgage, to *Hick* for a term, to secure this £100,

1754.  
Hick  
Att.  
Mons.

1784.

Hick

agt.

Molls.

remitted to such uses as *Baldwin* should appoint, remainder to him in fee. What could be the use of this power of appointment, I cannot see, unless it was to create a greater facility for the disposition of the estate. Next, as to the will, luckily for the plaintiff, there is a witness examined to support the will, who very strongly impeaches it, that is, he says, that *Hick* told *Baldwin*, if he would pay him, he did not desire the will by which *Baldwin* replied, he should have it, for he was his best friend. Does not the sense of this appear to be, that the will was taken as a further security? Then, as to the conveyance. Let the value of the estate be what it will, there is imposition on the face of this deed. There is no pretence of any proof, that the mother was entitled to any such annuity; and *Hick*, if the mother was not entitled to it, was not obliged to pay any part of it; that seems an imposition. Another consideration was the mortgage do the alehouse-keeper, this, though very probably for money consideration, I shall consider now as a small mortgage. Then there is an agreement to release the sum of £500, pretended to be due to *Hick* for money laid out, business done, &c. This is no other way accounted for than by supposing it to mean the same sum which was the consideration of the mortgage. Can there be a greater imposition? Here is one sum of £100 made to be two sums of £100, and that one sum is for a bill not produced, or delivered; and next comes a consideration which confirms all the evidence of his weakness; for would any man, entitled to an estate, take it as low as you will, at lowest it is £92 a year in possession, take an annuity of 10s. a week for it; or would any body propose such a thing to him, unless he was known to be incapable of managing, or thinking about his affairs? He was also very weak, and his life likely to be, as it proved, very short.

1785

H 1021

ag 20

M 1021

had not been made, that is, say they, the devisee and the most plausible case they put is, if the devisee had been a third person, a stranger, to the deed. Had this been the case of a third person, I know of no case to support that doctrine; but a great deal might be said in favour of a stranger not a party to the fraud, though the court always favours heirs-at-law. The case of *Orion v. Tyne* is the only one that comes near it. There were duplications of a will made, one of which was torn by the testator, and making a second. The second will being void, as the first was executed, it was contended that the first was not well revoked, and ought to be set up again. And it was there held, if this had been a clear intentional tearing, that the cancelling of one duplicate would clearly be a revocation of the other. But the evidence was not absolutely clear, that the will was intentionally torn; for it was not even torn, but only heard, by the evidence, which the court held, and the ground the court went on was, that the revocation was by accident, and not by intention. But this is a very different question, and will not pre- judice to the question, what would be done in the case of a stranger, I am of opinion, this will is well revoked, and ought not to be set up again; nor shall I send it to be tried at law. I will take it upon myself, for I consider the whole as one transaction, and ought to stand or fall together as such. In the case of *Bransby v. Kerrick*, it was held in the House of Lords, that this court ought not to make a will, but to leave it to be determined by the law. And so I would if this were a case of that kind. But though I would not make a will for myself, I would not set up a will here, when I am of opinion it is legally revoked.

The circumstances of this case (whatever would be the result) are to be found in *2 Vern. 741* and *Bro. Parl. Cas. 447*.

1754.  
 Attorney  
 General  
 agt.  
 TOMKINS.

but it appearing, that a leasehold-estate was among the personal effects subject to this charity, it was contended to be a void bequest, within the statute of mortmain, as it was agreed, that a specific devise of a leasehold-estate would be void, within that statute.

On the part of the charity, it was urged, that though a devise of a particular leasehold to a charity has been determined to be void, there is a great difference between that case, and a charge for the benefit of a charity upon a residuary estate, in which a leasehold is included; for, in this case, the whole belongs to the executor, who may turn it all into money, and then nobody can say, what was the money arising from the leasehold-estate, and what from the rest; or, at least, that the court, as in the case of the *Attorney General v. Graves*, would marshal the assets, as to make the leasehold-estate applicable, in the first place, to the payment of debts, and legacies, so that out of the other assets the devise to the charity might be satisfied.

On the other hand, it was answered, by Mr. Noel and Mr. Wilmsham, that a specific devise of a leasehold-estate, was agreed to be void, because it was what the testator had particularly in view; that in a general devise, including a leasehold-estate, it was equally in view, the inserting it *nominate* could make no such difference. That, if such a distinction was established, would lead to nothing to do but to lay out their fortunes in leasehold-estates, leases of 2000 years if they pleased, instead of short leases, like the present, and then, by devising them in general words, the act may be eluded.

But, if the court should think fit to marshal the assets

*Ambl. 155.*

in the manner contended for, the surplus would be too large for the purposes of the charity, and, therefore, only what should be thought sufficient, should be so applied. The personal estate was said to amount, in the whole, inclusive of the leasehold-estate, to £2100, and the debts and legacies to about £1500, so that upwards of £500 would remain.

Lord CHANCELLOR.

There can be no doubt, but, a devise of a leasehold-estate is void under this act of parliament, and such was my opinion in the *Attorney General v. Graves*, on this consideration, that, were it otherwise, the act might be entirely evaded, and on the foundation of former determinations, with respect to acts disabling papists, &c., on which it had been determined, that a devise of a leasehold-estate to them is void, and the words of those acts, and this, are nearly the same. Then it was questioned, whether this, not being devised *eo nomine*, but as a part of a general residue, shall not materially vary the case? But I shall not found my opinion on such a distinction.

A distinction was attempted in the *Attorney General v. Graves*, not, on the foundation of a difference between a specific devise and a general one, that would be frivolous, but the ground of the distinction was this, that, where it was given out of the personal estate in general, there was to be a liquidation of the whole, so that no part of it could be properly said, to be the produce of land, any more than the other parts of the personal estate. I remember, I gave no opinion on this point, though, upon the whole, I inclined to think it would be bad, nor do I now give any opinion on it.

My determination turns upon the last point; and I am

1754.

Attorney  
General

TOMKINS



1734  
 Attorney  
 General  
 Sir John  
 Tomlinson  
 and  
 Sir John  
 Mordaunt

of opinion, the assets ought to be apportioned in such manner, as the plaintiff, contended, in support of this charter. This court has established several rules in apportioning of assets, and has always, on occasions, uttered *magis valeat*. Where legacies are bequeathed in such manner, that some of them are a charge on the real and personal estate both, and others affect the personal estate only, the latter are to be paid from thence, and the debt to be made good from the real, if the personal assets sufficient for both. So, where, in enumerating the assets, particular of which, a personal estate, requisite, obviously omitted, and not comprehended in the bequest of the residue; those being undisposed of by the will, shall be first applied to, pay debts and legacies, that thereby the residue which has been well disposed of, may go to the residuary legatee.

So, where debts, or legacies, are directed to be paid out of the personal estate, and, if that is not sufficient, out of the real estate, part of which is devised, and part committed to the court will first apply the real estate descended, before they break in upon the devise, though the devise be, in general, favoured in this court, yet the reason of the case, consistent with the testator's intention; required by and of that opinion, I was in the case of *Stapleton v. Stapleton* (though first of a different one) on being given the full consideration, and so it has been taken ever since.

And I am of opinion, this case will fall within the same rules; and though I have said more than once, that the court ought not to set up new rules of marshalling assets, to evade this act, yet ought we to apply our old rules. If then the devise, which includes both sorts of personal

\* 2 Atk. 43.

BAKER *agt.* GEARE.

A bankrupt may bring a bill for an injunction, to stop an action at law, proceeded in against him, after a commission taken out.

The plaintiff was a bankrupt, against whom a commission had been taken out, after which the defendant bringing an action against him at law, this bill was filed, charging the defendant with collusion with the assignees, that he was greatly indebted to his estate, praying a discovery, and an injunction to stop the proceedings at law. To this the defendant demurred, which was now argued.

*Lord CHANCELLOR.*

A bankrupt, generally, cannot bring a bill against a debtor to his estate on a general charge of collusion between the debtor and the assignees, though I will not say, but that, on a special case, he possibly might, yet I cannot say he should, for he has a more summary remedy. It would be very vexatious to permit a bankrupt to bring a bill against a debtor generally, for, if he proceeds in it, I can decree no payment to the plaintiff, but to a co-defendant, the assignee. But, in this case, as the defendant has brought an action at law after a commission, may not the bankrupt bring a bill for an injunction? Is that a defence? Had the bankrupt been arrested in this action, and I had directed the commissioners to examine what was due to the creditor, and it had appeared to be very little, I could not have superseded a judgment at law, under the commission, and therefore, if he might not, in these cases, bring a bill for an injunction, he would be without remedy.

Therefore, let the demurrer be over-ruled.

1754.

agt.

STAPLES.

he is so, for you may examine him as a witness; if he has deeds, that will not do, for his principal has in law the custody of them, and shall be compelled to produce them.

Mr. Wilbraham. If he may demur to the bill as a counsel, he may demur to an interrogatory.

Lord CHANCELLOR.

2 If it is very true, but as an agent he cannot demur to an interrogatory. I can allow the demurrer without prejudice to his being examined as a witness, so that that matter will be open. It does not now sufficiently appear to me,

whether he acted as counsel or not. In the case that was

mentioned, had that case and opinion been in the hands of counsel, neither Lord King, nor the court, had any apprehension of his being obliged to produce it: the fact there was, that it was in the party's own hands, who had stated and admitted it as a fact, to be so.

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Demurrer allowed.

ASSURANCE

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2. A disposition by will of a ~~feme covert~~ of property earned in a trade, pursuant to a power, is not to be acted upon in the court below.—*Jenkins agt. Whitehouse, K. B. M. 31 G. 2. Page 161*
3. A prohibition issued to the spiritual court, and trover held to lie against an administrator, for wrongfully interposing.—*Bear agt. Syer, K. B. H. 32 G. 2. 441*
4. After sentence given for contumacy in the Spiritual Court, this court will not grant a prohibition, but leave the party to his appeal.—*Sims agt. Sims, K. B. T. 32 and 33 G. 2. Page 538*

## QUO WARRANTO.

1. A *quo warranto* information moved for on the stat. 5 and 6 *Edm. 6.* against the officers of a court-leet, and a rule granted.—*The King agt. Authrop, and Dunn, K. B. T. 30 and 31 G. 2. Page 17*

## QUO WARRANTO.

2. A charge of having held a court in a corporation in the absence of those to whom by office the rights of presidency belonged, does not amount to that of an usurpation of a franchise, within the stat. 9 *Edm. 1. c. 20.* and a judgment on that act having been pronounced after a verdict on an information in which that allegation was preferred, is reversed in error.—*The King agt. Williams, K. B. M. 31 G. 2. Page 68*
3. Upon the removal of nine portmen for non-attendance at the courts of a corporation, and an election of a new portman by the only remaining one, held, that an incidental power of amending for offences against the institutions of a corporation is vested in the body; but that an absence from the courts, without having received any special requisition to attend them, was not a sufficient cause for the amotion of officers whose presence was not always indispensable.—*The King agt. Richardson, K. B. M. H. and K. B. G. 2. Page 105*
4. A *quo warranto* information will not be conceded, by which the validity of appointments in a corporation, long acquiesced in, would be disputed to ease of their Borough of St. Ives.—*The King agt. Stephens, K. B. M. 31 G. 2. and 32 G. 2. Page 17*
5. A rule for a *quo warranto* information

tion, ill founded, and discharged with costs.—*The King* agt. *William Beals*. K. B. E. 32 G. 2.

Page 497

6. A quo warranto information issued for holding an annual office, after its close, tries a civil right.—*The King* agt. *The Aldermen of New Radnor*. K. B. E. 32 G. 2. 498

## R.

## RECOVERY.

The vouchee's death, who was also tenant in tail, before judgment in a recovery, assigned for error by a remainder-man bringing a writ of error, is held a sufficient cause for its reversal; and an averment of that fact in the writ, to be consistent with the record declaratory of vouchee's appearance by attorney.—*Sheepshank* agt. *Lucas*. K. B. M. 31 G. 2. 76

## REMOVAL.

Husband, and wife, having returned, without a certificate, to the parish whence they were removed, and the wife been committed to prison with him, in consequence: held, that she is not liable to punishment under the vagrant acts, for having accompanied her husband in his return; and the warrant of commitment not being for the

term, or purposes limited in the statutes, is adjudged to be void.—*Baldwin*, and wife, agt. *Blackmore*, Esq. K. B. T. 30 and 31 G. 2.

Page 38

## S.

## SHERIFF.

Proceedings set aside on a writ directed to the sheriff, instead of the sheriffs of London.—*Ugh* agt. *Kingwood*. K. B. E. 31 G. 2.

287

## T.

## TREASON.

A prisoner's hand-writing allowed to be proved by witnesses who had seen him write; and sending intelligence to enemies, though intercepted, is treason.—*The King* agt. *Dr. Henry*. K. B. T. 31 G. 2.

355

## TRESPASS.

In a plea of justification in trespass, under process of a court constituted by letters patent, proof of them needs not be added, nor the proceedings pointed out minutely; and *molliter manus* answers the battery.—*William Tiley*



agt. *Abraham Foxall*. C. B. T.  
31 G. 2. . . . Page 308

## TRIAL.

A cause will not be deferred till the final decision in an action for a libel, by reason of which it was originally put off.—*The King* agt. *Martha Gray*. K. B. H. 31 G. 2.

20111111 276

## TROVER.

The bearer of a bank-note is entitled to bring *trover*, to regain the possession of it, withheld at the instance of one who had formerly been robbed of the same.—*Miller* agt. *Race*. K. B. H. 31 G. 2. 189

G. 2. 189

countersigned and delivered to committee  
adit doidw rebun vilangq adit 30  
-etias ni debun - etias ni debun  
Juncion to d - etias ni debun  
V. 375

## VERDICT.

1. A verdict having been delivered in for the defendant generally, by mistake of the foreman, when the jury had found on one issue for the plaintiff, and on the other only for

the defendant, on motion for a new trial, &c., leave given to move to amend the *postea*, on the affidavits of the jury, &c.—*Cogan* agt. *Ebden*. K. B. T. 30 and 31 G. 2.

Page 24

2. A jury are competent to take cognizance of a fraud disclosed in the evidence before them: and where they had found a verdict without respect to those circumstances which when reviewed by the court, appeared clearly to indicate a fraudulent imposition, held, that a new trial ought to be granted.—*Bright*, executor of *Hannah Crisp*, agt. *Eynon*. K. B. T. 30 and 31 G. 2. . . . . 53

3. A new trial not granted, though a verdict had been given against evidence, and entered in the merits.—*Burton* agt. *Thompson*. K. B. M. 32 G. 2. . . . . 375
4. A verdict found generally against a defendant in trespass held sufficiently expressive of opinion in respect of a pleaded justification.—*Hawkes* agt. *Crofton*. K. B. M. 32 G. 2. . . . . 388

Agreement between a defendant and a plaintiff, of a legal character, which they entered into for themselves, and then proceeded to fulfill the contract, and to the question of whether the parties giving the representation cannot annul the decision, referred by the court, by the

31 G. 2. , ,  
Agst. Abraham Fossil. C. B. A.  
Page 30.

DAINT.

**AN** ... **A**

## I N D E X

**TO THE**

## PRINCIPAL MATTERS

**CONTAINED IN**

## PART IV

## A. ADMINISTRATION

## ADMINISTRATION

The court will not grant an injunction to stay proceedings to repeal letters of administration, on a suggestion that a judgment will consequently be released, &c.—*Kennedy* agt. *Kennedy*. Page 26

**AGREEMENT.**

Agreement between vendor and purchaser, of a copyhold-estate, in which they covenant for themselves, and their representatives, to fulfil the contract, and to refer the question of value. One of the parties dying, the representatives cannot annul the decision of the referee, by shewing an error in his

**BOND.**

estimate, or compel the acceptance of the penalty, under which the agreement was secured, in satisfaction of their breach of contract.

—Belchier agt. Reynolds. Page 87

## B

**BANKRUPT.** 10.19

The court shewing grounds for doubt, whether a clergyman could be a bankrupt, directed the point to be tried at law.—*Gawthorne* agt. *Meymott*. . . . . 20

**BOND.**

**Debt on a bond, held subsisting:  
and principal, with interest, to be**

paid the plaintiff; circuitry need-  
less.—*Scott* agt. *Ellers*. Page 95

—*and directed by decree to be*  
—*and for payment of debts; held,*  
—*the equity of redemption of*  
—*in adverse parties; and the plea*

C.

—*and the* CREDITOR

A simple contract creditor has no  
claim on the freehold, whose debt  
is secured on another part of the  
testator's estate.—*Alexander* agt.  
*Holland*. . . . 4

HEIR

D.

DEMURRER.

1. A bankrupt may bring a bill for  
an injunction, to stop an action at  
law, proceeded in against him,  
after a commission taken out.—  
*Baker* agt. *Geare*. . . . 134

2. An agent made defendant to a bill  
for a discovery, may demur to it, is  
not compellable to produce deeds,  
and may be examined for the  
plaintiff. — agt. *Staples*. 135

## DEPOSITIONS.

Depositions quashed, on the certi-  
ficate of the commissioners before  
whom they were taken, that the  
witness under examination con-  
sulted a document drawn out for  
her by plaintiff's attorney, and  
minutes of her own, and had given

testimony conformably to them.—  
*Anonymus*. Page 27

DEVISE.

1. The freehold vests in the devisee,  
during a term with which his  
estate is charged; and the words  
“for life, and to his heirs male,”  
constitute him tenant in tail.—  
*Lister* agt. *Lister*, and others. 1

2. Words in the last clause of a will,  
“to the use of such child, or  
children, as shall survive, where  
the testator had but two, explain  
his intention, that both shall take  
equally on surviving him, and,  
under the devise, the survivor of  
them, and the heirs, &c.—*Barret*  
agt. *Lun*. . . . 9

3. A. devises his estate to his daughter  
in strict settlement, and, if she  
should die without issue living at  
her death, limitations over, &c. held,  
that the contingency related merely  
to the trust estate during the mi-  
nority of Sir H. N., and that the  
remainders were all vested.—*Le-*  
*thulier* agt. *Tracy*, et Ux. 140

4. Testator, after bequeathing an  
annuity, and goods to his wife for  
her life, directs his whole fortune,  
in default of his own issue, and of  
a 2d son of his brother, and a 2d  
son of his sister, to be divided be-  
tween the plaintiff, and the de-  
fendant, making the latter residu-  
ary legatee. Held, that, under the  
words *whole fortune*, the interest

of the moiety, till the determination of the contingency, did not belong to the plaintiff; and that the residuary legatee was entitled to that, and the reversionary interest in the goods left to the wife.

—*Milford agt. Wicker.* Page 61

5. Testator appoints executors in trust to pay the interest of £1000

to his son for life, then to his son's children, and, if he left none, or they should die unmarried, and

under age, bequeaths a moiety of the principal unto G. W. and his wife, or their children, and representatives. Held, that the estate

which passed on the death of the testator, under the second disposition, was consonant to that limited under the first, not absolute, or

vested; but remained in contingency, till the event of the son dying, or his issue failing, &c. determined to whom it belonged;

the parents, if then living, being entitled, if not, in the next place, their children, or, finally, their representatives. A devise of a copy-

hold surrendered, &c. signed only by the testator, is sufficient.—*Fenwick agt. Parson.*

109

to him, &c.

he a line, &c.

ed himself, &c.

ed been, &c.

—*E.*

EQUITY OF REDEMPTION.

The plaintiff claims the advowson of

a vicarage, as mortgagor, insisting, that it was inserted fraudulently in a particular of a trust-estate, directed by decree to be sold for payment of debts; held, that the equity of redemption of an advowson lapses, and the plea allowed with costs, &c.—*Mallock agt. Salter.* Page 49

no mistake

to be secured

—*H.*

—*H.*

—*H.*

—*H.*

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among other personalty, for the support of a charity, under a devise void by statute Geo. 2. c. 36., is applicable, in the first place, as assets undisposed of, to the payment of debts, &c. and the residue is to be appropriated according to the testator's intentions. *Attorney-General agt. Tomkins.*

Page 129  
 NE EXEAT REGNUM.

An *exeat regnum* prayed in aid, to resist a demand from one usually resident in *Jamaica*, and refused. *Curry agt. ...*

Page 29  
 PARAPHERNALIA.

A husband is not entitled to dispose by will of his wife's *paraphernalia*; but, should he bequeath them, she must either abide by the will, or relinquish all benefit under it altogether. *Churchill agt. Small.*

Page 6  
 POWER.

A *feme covert*, in pursuance of a power reserved to her in the marriage-settlement, devises different parts of the settled estate; and also

lands after purchased by her with the produce of it, so devises a personalty, and gives all the rest of her property to her residuary legatees, and executor *Heldgate*, that by the residuary clause, both real and personal estate passed, as by appointment; 2dly, that a request of a moiety of M. farm, followed by one of other lands, &c. to the same person, his executor, &c. for every corded a few 3dly, that freehold lands contracted for, or purchased by a *feme covert*, cannot be disposed of by her will; but that leasehold-estates may pass. 4thly, that a sum to which she might have appointed, fell to her executor, and not to her surviving husband. — *Churchill agt. Dibben.*

Page 68  
 PURCHASOR.

A purchaser of an estate devised subject to the payment of the testator's debts and legacies, in general, need not look to the discharge of them, much of a bill brought against a devisee for payment of a debt generally out of an estate; a purchaser is not bound to take notice. — *Walker agt. Flinthead.*

Page 57  
 RELEASE.

Application to be relieved against re-

leases, possession having been held in pursuance of them for 30 years, &c. refused.—*Hickenbotham* agt. *Ould*. . . . . Page 92

## RENT.

A tenant in tail is tenant for life under the statute 11 *Geo.* 2. c. 19., and his representatives entitled to the proportion of half year's rent, which had accrued under a lease made by him, at the time of his death. But decreed chiefly on account of the tenant's having paid the whole rent to the remainderman.—*Paget* agt. *Gee*. . . . . 31

## REVOCATION.

Whether, on setting aside a deed of conveyance, on a clear manifestation of fraud, a will previously made to the grantee under the deed, has been revoked by it, and is rendered again valid by annihilating the deed? Held, that any deed shewing an intent to make a different disposition, is a revocation of a will; and that in the present case, the whole being one transaction between the same parties, the court would not set up the will,

though, had the devisee been a third person, much might have been said in his favour.—*Hick* agt. *Mors* and *Wells*, *et c* cont'.

Page 117

## RULE.

1. After order for time, you cannot refer, &c.—*Anonymous*. . . . . 21
2. Insufficiency of an answer, not to be insisted upon, on shewing cause, &c.—*Anonymous*. . . . . 23
3. If a commission issued in term time be made returnable without delay, it is returnable the first day of the next term: if issued in the vacation, the last day of the next term.—*Anonymous*. . . . . 30

## T.

## TESTE OF ORIGINAL WRIT.

Motion to supersede an original writ, on the ground of its being antedated, in respect to the day on which the actual sealing and delivery of it took place, refused.—*Roan* agt. *Gally*. . . . . 24

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